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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 293. 47.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD DEANE, ET AL., PLAINTIFFS IN ERROR,

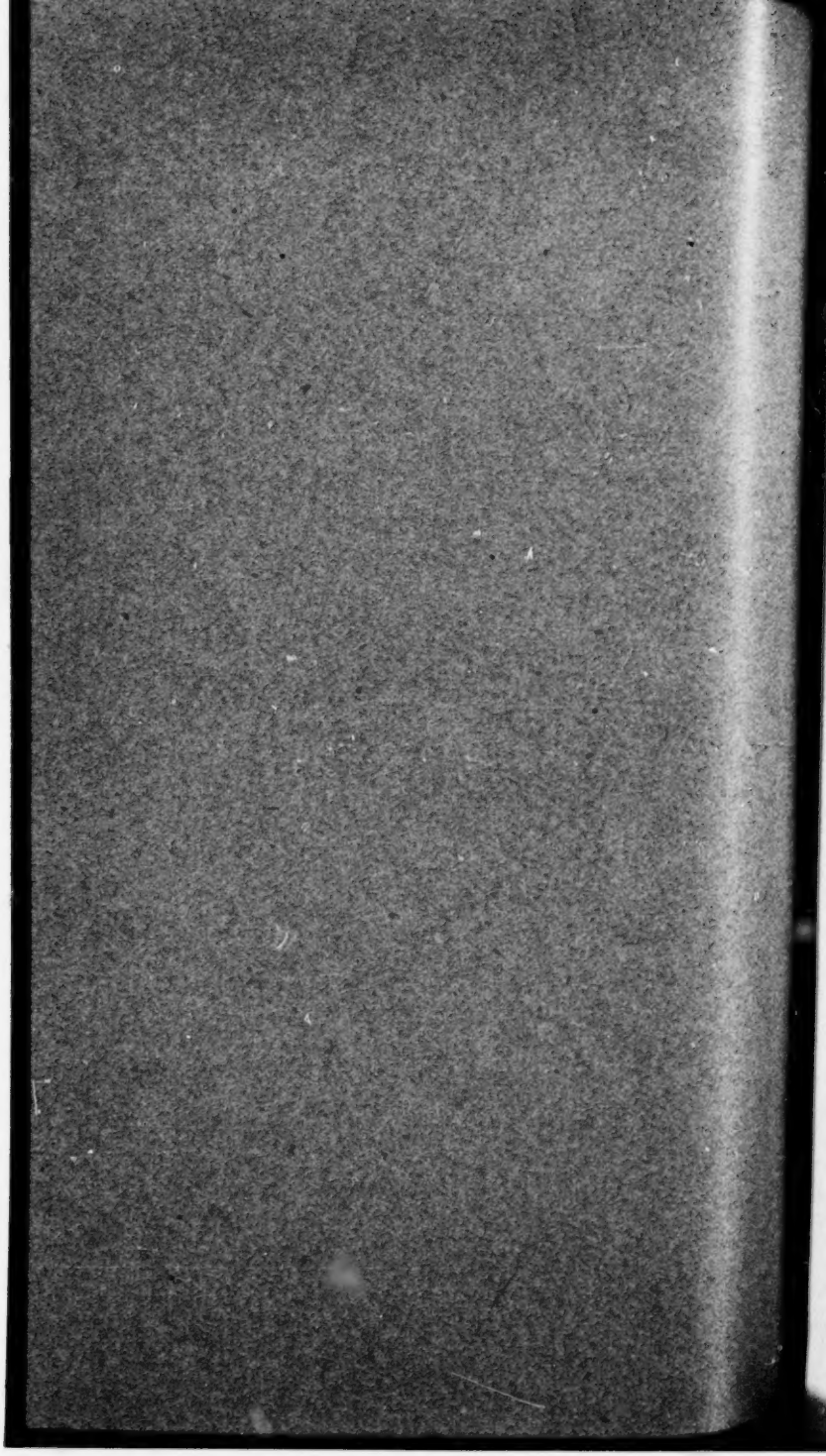
vs.

JACOB SLAGHT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED MAY 4, 1899.

(17,393.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1899.

1 In the Superior Court of the State of Washington for Whitman County.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company, a Corporation; Spokane & Palouse Land Company, a Corporation; Palouse Mill Company, a Corporation, and A. F. Pugh, Plaintiffs, *vs.* JACOB SLAGHT, Defendant.	Second Amended Complaint.

Plaintiffs, for second amended complaint and cause of action against said defendant, allege—

I.

That the Spokane & Palouse Railway Company is a corporation organized and existing under the laws of the Territory (now State) of Washington.

II.

That the Spokane and Palouse Land Company is a corporation organized and existing under the laws of the State of Washington.

III.

That the Palouse Mill Company is a corporation organized and existing under the laws of the State of Washington.

IV.

That by the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof, Congress granted to the Northern Pacific Railroad Company lands as follows, to wit: "Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty
2 alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile, on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said

company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

By the sixth section of said act of July 2, 1864, Congress further provided as follows, to wit:

"And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be subject to sale, or entry or pre-emption before or after they are surveyed, except by said company as provided in this act."

V.

That the said Northern Pacific Railroad Company signified its acceptance of the terms, conditions, and impositions of said act of July 2, 1864, in writing, under the corporate seal of said company, executed pursuant to the direction of its board of directors, first had and obtained, and within two years of the passage of said act, to wit, December 29, 1864, served such acceptance upon the President of the United States.

VI.

That having surveyed the general route of that portion of
3 its railroad extending from Minnesota across the then Territories of Dakota, Montana, and Idaho, and across that portion of the Territory of Washington lying east of a point on the Columbia river near the mouth of the Snake river, it fixed said portion of the general route of its road by causing a map thereof, approved by the Secretary of the Interior, to be filed in the office of the Commissioner of the General Land Office; that said map of general route was so filed February 21, 1872; that the following described land, to wit, lots ten, eleven, fourteen, and fifteen, in section one, township sixteen north of range forty-five east, Willamette meridian, Washington, was situated coterminous with that portion of said general route located in the Territory of Washington and within forty miles thereof.

That March 30th, 1872, the Commissioner of the General Land Office transmitted to the register and receiver of the United States district land office at Walla Walla, Washington, that being the district in which the lands in eastern Washington, including the lands hereinbefore described, were situate, a diagram showing said line of general route so fixed, with limits embracing the lands coterminous therewith and within forty miles thereof indicated thereon, and directed the register and receiver of said district land office to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of the public lands within the said limits; that said order of withdrawal and diagram were received at the said district land office April 22, 1872; that the land hereinbefore described was within the forty-mile limits as designated on said diagram, and was

within the terms of said order of withdrawal; that said land was at the date of the grant to said Northern Pacific Railroad Company, at the date when said map of general route was filed in the office of the Commissioner of the General Land Office, at the date of said order of withdrawal, and at the date when said order of
4 withdrawal and diagram were received at the United States district land office at Walla Walla, Washington, public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and it was at all of said times free from pre-emption or other claims or rights, and said land was and is agricultural land.

Plaintiffs further allege that thereafter the said Northern Pacific Railroad Company caused the line of said railroad and telegraph extending from a point in township seven north of range thirty-one east, Willamette meridian, northeasterly to a point in section sixteen, township twenty-five north of range forty-three east of Willamette meridian, Washington, to be surveyed and definitely located, and on the 4th day of October, A. D. 1880, fixed the definite location of said portion of its railroad and telegraph line by causing a plat thereof, approved by the Secretary of the Interior, to be filed in the office of the Commissioner of the General Land Office; that the said land hereinbefore described was located coterminous with and more than forty but within fifty miles of said portion of said railroad and telegraph line thus definitely fixed; that on November 13, 1880, the Commissioner of the General Land Office transmitted to the register and receiver of the United States district land office at Colfax, Washington Territory, that being the district in which said land hereinbefore described were situate, a diagram showing the said line of railroad and telegraph so definitely fixed, with limits indicated thereon, including the lands coterminous with said line and within forty and fifty miles thereof, the first-named or forty-mile limits including the lands hereinafter designated as the place limits and the fifty-mile limits including the lands hereinafter designated as the indemnity limits, and directed the register and receiver of the said district land office to continue
5 the reservation of all lands theretofore withdrawn by the Commissioner's order of March 30, 1872, hereinbefore referred to, and, in addition, to withhold from sale or entry all the odd-numbered sections and parts of sections, surveyed and unsurveyed, to the extent of fifty miles from said line, and directed that said order should take effect from October 4, 1880; that said order of withdrawal and diagram were received in the said district land office November 30, 1880; that the land hereinbefore described was at the date when the line of said Northern Pacific railroad coterminous therewith was definitely fixed, as aforesaid, and at the date of the making of the said order of withdrawal, to wit, November 13, 1880, and at the date when said order and diagram were received at the United States district land office at Colfax, to wit, November 30, 1880, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, except by virtue of the said withdrawal for the benefit of the said Northern

Pacific Railroad Company, as herein set forth, and it was at all of said times free from pre-emption or other claims or rights, except for the claims and rights of the said railroad company.

That thereafter said Northern Pacific Railroad Company proceeded with the construction of that portion of its said railroad and telegraph line extending on, over, and along said line of definite location so fixed, as aforesaid, and completed the same prior to November, 1881; that thereupon the President of the United States appointed three commissioners to examine said portions of said railroad and telegraph line, and that the said commissioners, having carefully examined the same, on the 4th day of November, 1881, reported that the said portion of the said railroad and telegraph line had been constructed and completed, as required by the said act of Congress approved July 2, 1864, and the said report
6 was duly approved and said railroad and telegraph line accepted by the President of the United States on the 26th day of November, 1881.

VII.

Plaintiffs further aver that prior to the year 1888 the said Northern Pacific Railroad Company definitely fixed the line of its railroad extending from a point on Lake Superior to a point at or near the town of Wallula, in the Territory (now State) of Washington, and extending from a point in the city of Portland, Oregon, to a point near the city of Tacoma, in the Territory (now State) of Washington, and definitely fixed the line of the branch of said railroad extending from a point at or near the town of Pasco, in the Territory (now State) of Washington, to the said city of Tacoma, on Puget's sound, and prior to said year constructed and caused to be constructed and put in operation a continuous line of railroad and telegraph extending on, over, and along the line of definite location of said railroad fixed as aforesaid; that as fast as portions of said railroad and telegraph line equal to or exceeding twenty-five miles in length were so constructed, as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in good, substantial, and workmanlike manner in all respects as required by said act of Congress; that such reports were accepted and approved by the President of the United States, as provided by said act of Congress approved July 2, 1864; that at the date of fixing the definite location of said railroad and telegraph line certain odd-numbered sections and parts of odd-numbered sections situate opposite to and within the distance of forty miles of said line of definite location in the Territories and within twenty miles of said line in the States had been re-
7 served, sold, granted, or otherwise appropriated by the United States, and pre-emption or other claims or rights had attached thereto; that the area of the lands which were within the place limits (forty miles in the Territories and twenty miles in the States) of said grant and included in odd-numbered sections, which were thus reserved, sold, granted, and other-

wise appropriated, and to which pre-emption and other claims and rights had attached, and which were mineral lands, being the lands in lieu of which said Northern Pacific Railroad Company had a right to select indemnity, amounted to 10,624,746.27 acres; that the area of lands within the first indemnity limits of the said Northern Pacific grant, to wit, coterminous with said line and within the forty and fifty mile limits in the Territories and the twenty and thirty mile limits in the States, which were at the dates of the definite locations of the line of said railroad coterminous therewith, not mineral public lands included in odd-numbered sections and subject to selection by said railroad company, did not exceed 7,177,769.71 acres, and there was not then, nor has there been at any time since, sufficient lands within the limits designated in the act of Congress approved July 2, 1864, subject to the grant to the said Northern Pacific Railroad Company to give to said company the quantity of lands granted to it by the said act of Congress approved July 2, 1864.

VIII.

That on or about December 15, 1883, the said Northern Pacific Railroad Company applied at the United States district land office in the district in which such lands were situate to select and selected the said lots ten, eleven, fourteen, and fifteen, in section one, township 16 north of range 45 east, W. M., Washington, with other lands, as indemnity, in lieu of lands within the place limits of the grant to said company, and which had been reserved, sold, granted,
or otherwise appropriated, or to which pre-emption or other
8 claims or rights were attached at the date when the line of
said Northern Pacific railroad coterminous therewith was definitely fixed by filing a plat thereof in the office of the Commissioner of the General Land Office, being lands in lieu of which the said railroad company was authorized to take other lands by the terms and provisions of the said act of Congress approved July 2, 1864; that said lands were so selected by the said Northern Pacific Railroad Company by filing a list thereof, prepared in the manner and form prescribed in the rules and regulations of the Interior Department, in the United States district land office and tendering and paying to the receiver of the said United States district land office all fees which the said company was by law and by the rules and regulations of the Interior Department required to pay to said receiver upon the selection of lands; that said list was accepted, allowed, and approved by the register and receiver of the said district land office on December 17, 1883, and the said fees so tendered to said register and receiver accepted, and thereafter the said list was transmitted to the office of the Commissioner of the General Land Office for approval; that at the date of the filing of said list and of the acceptance, allowance, and approval of said selection by the said United States district land officers, as aforesaid, the said land hereinbefore described was public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights

except such reservation, appropriation, claim, and rights as had attached thereto in favor of the said Northern Pacific Railroad Company, as hereinbefore set forth.

That thereafter, to wit, on October 26, 1887, the said Northern Pacific Railroad Company, in compliance with other and additional instructions of the said officers of the Interior Department of the United States, filed a certain list designating the losses in lieu of which the said lands described in said selection list filed December 17, 1883, as aforesaid, were selected, which said other and additional instructions were issued and given after said selection had been accepted, allowed, and approved, as aforesaid; that thereafter, to wit, in the years 1892 and 1893, the said Northern Pacific Railroad Company, in compliance with other and additional instructions issued by the officers of the Interior Department of the United States subsequent to the acceptance, allowance, and approval of said selection, made as aforesaid, rearranged said list of losses and said selection list so that the losses for which each tract of land selected by said company had been taken should be specifically designated; that, as appears from said rearranged list, the said lands hereinbefore described were selected in lieu of certain lands included in section seven, township nine north of range fifteen east, W. M., Washington, which said last-described land was located coterminous with and within forty miles of the line of the said Northern Pacific railroad as definitely fixed, and was at the date of the grant to the said Northern Pacific Railroad Company and at the date when the line of said Northern Pacific railroad coterminous therewith was definitely fixed, as aforesaid, included in a reservation of land set apart for the Yakima Indians.

IX.

That after the selection of said land by the said Northern Pacific Railroad Company, to wit, on or about December 24th, 1885, the said Northern Pacific Railroad Company entered into a contract in writing with the plaintiff William L. Powers to convey lots 3, 6, 11, and 14, in said section one, township sixteen north of range forty-five east, upon the payment by said Powers to the said railroad company of the sum of $822.00; that thereafter the said Powers having paid to the said railroad company the said sum, the said railroad company, on or about August 4, 1887, made, executed, and delivered to the said Powers its certain instrument in writing, conveying to the said Powers the said lots last hereinbefore described and all thereof.

That on or about July 30, 1887, the said Northern Pacific Railroad Company made, executed, and delivered its certain instrument in writing to the said plaintiff, William L. Powers, wherein and whereby it conveyed to the said plaintiff lots 2, 7, 10, and 15, in said section one, township sixteen north of range forty-five east, W. M.

X.

That in the year 1877 one A. M. Duffield settled upon lots 2, 3, 6, 7, 10, 11, 14, and 15, in section one, township sixteen north of

range 45 east, W. M., Washington, said lands so settled upon aggregating in area — acres; that shortly thereafter the said Duffield sold and assigned his possessory rights and improvements to one L. M. Rhodes, and thereafter, he, the said Rhodes, having failed to pay for said possessory right and improvements, the said right and improvements were assigned to the said plaintiff, William L. Powers, who settled thereon in 1881, with the expectation and intention of purchasing said lands or a portion thereof from the said railroad company; that soon after such settlement the said Powers offered to purchase lots 2, 7, 10, and 15 from the said railroad company, and at the same time one John G. Powers, a brother of said plaintiff, William L. Powers, offered to purchase lots 3, 6, 11, and 14 from said company; that thereafter the said plaintiff, William L. Powers, purchased the said lands from the said railroad company, as hereinbefore set forth, having prior to said purchase taken a relinquishment from the said John G. Powers of all interest in and to lots 2, 7, 10, and 15.

11 That defendant Slaght, on or about March 1st, 1883, rented and leased said lot ten of and from said William L. Powers, and under and in pursuance of such renting and leasing from said Powers said Slaght was to and did receive and take possession of the said lot ten on or about said date; that plaintiffs allege that in and by said contract said Slaght agreed to and did pay rental to said Powers for the use and occupation of said premises from the date said Slaght received and took possession thereof until on or about the 31st day of October, 1887.

That on October 31, 1887, the said defendant, Slaght, presented an application at the United States district land office for the district in which said land was situate to enter the said described lots 10, 11, 14, and 15, in section 1, township 16 north of range 45 east, W. M., Washington, as public lands of the United States, under the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain;" that in the said application the said Slaght alleged that he had settled and established his actual residence upon the said lands March 4th, 1883, and that such residence had been thereafter continuous, and that he had built a house on said land and improved the same; but plaintiffs aver that said settlement, occupation, and improvement by Slaght were under and in pursuance of said renting and leasing of and from said Powers as hereinbefore set forth and not otherwise.

See p. 11, Comp.

Plaintiffs further aver that the Northern Pacific Railroad Company, having been notified of the application of said Jacob Slaght to enter said land, filed its objections against the allowance thereof on or about December 2, 1887; that thereupon a hearing was ordered by the United States district land officers for the district in which said land was situate for the purpose of determining the

12 rights of the said railroad company and the said Jacob Slaght in and to the said described land; that thereupon such proceedings were had in said contest that said United States district

land officers, on or about the — day of July, 1889, held that the said land was excepted from the operation of the selection of the said Northern Pacific Railroad Company by reason of the settlement of this plaintiff, William L. Powers, and that the said defendant, Slaght, had settled upon said land as a tenant of said Powers; that thereafter the said Northern Pacific Railroad Company appealed from said decision to the Commissioner of the General Land Office, and such further proceedings were taken and had in said contest that on the 13th day of April, 1895, the said Commissioner of the General Land Office made and rendered his certain decision in said contest in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 13, 1895.

JACOB SLAGHT
vs.
NOR. PAC. R. R. CO.

Involving homestead application for lots 10, 11, 14, 15, sec. 1, 16 N., 45 E.

Register & receiver, Walla Walla, Washington.

SIRS: I have considered the contest of Jacob Slaght *vs.* Northern Pacific Railroad Company and William L. Powers, intervenor, involving lots 10, 11, 14, 15, sec. 1, T. 16 N., R. 45 east, the record in which was transmitted with your letter of July 10, 1889, on appeal by Jacob Slaght and said railroad company from your decision in favor of William L. Powers, intervenor.

The land is within the limits of the withdrawal upon the line of the amended general route of said road, the map showing which was filed Feb. 21, 1872, and upon the definite location of the road it fell within the indemnity limits, the order for the withdrawal of which was received at the local office November 30, 1880.

These withdrawals have been held by the department to be without authority of law and of no effect (17 L. D., 8, and 18 L. D., 87).

On December 17, 1883, the company selected the land in question under act of July 2, 1864 (13 Stat., 356), per list No. 1, and on the same day said company selected the land under acts of July 2, 1864 (13 Stat., 356), and May 31, 1870 (16 Stat., 376), for indemnity purposes per amendatory list No. 2.

On October 31, 1887, Jacob Slaght presented an application to make homestead entry for this land and alleged that he settled and established his actual residence thereon March 4, 1883, and the same has been continuous; that he built a house 12 x 14 feet, a kitchen 10 x 12 feet, a stable, dug a cellar and broke a garden spot,
and built a half mile of fence, and that his improvements
13 are worth about $275.00.

The company was duly notified of said application and filed its objections against the acceptance of the same Dec. 2, 1887.

Upon the issuance of notice to the parties in interest a hearing

in the case was had and concluded April 4, 1889, at which all parties were represented.

The testimony adduced at the hearing on behalf of Slaght shows that he established his actual residence on the land in March, 1883; that he broke and planted a garden; that within a few days after moving in the log house on the land he built an addition thereto; that in September, 1883, he built a house 12 x 14 feet, a kitchen, a stable, a chicken-house, dug a cellar, and fenced about 80 acres; that his residence on the above-described tracts of land has been continuous since March 1, 1883, and that his improvements are worth about $400.00, and that he is a qualified settler.

The testimony adduced at the hearing on behalf of the defendants is to the effect that William L. Powers has resided in Palouse city, Whitman county, Washington, and on sec 1, T. 16 N., R. 45 E., for thirteen years; that prior to Slaght's residence on the land in question a part of it was claimed by John D. Powers, a brother of the intervenor; that Slaght went into possession of the land by renting it from the said William L. Powers; that Slaght established himself on the land in 1883 and is still residing thereon; that a portion of this land has been platted as an addition to the town of Palouse city, previous to which Slaght had lived on the land for two years; that Slaght's residence is on lot 10; that when he first settled upon the place he paid a small rental to William L. Powers; that the intervenor has resided upon lot 7, sec. 1, T. 16 N., R. 45 E., since 1881; that he intended to get title to the land involved in this case from the Northern Pacific Railroad Company under its grant of July 2, 1864 (*supra*); that William L. Powers has exhausted all of his rights under the public land laws except his timber-culture right; that in 1877 A. M. Duffield settled upon and laid claim to lots 2, 3, 6, 7, 10, 11, 14, 15, sec. 1, T. 16 N., R. 45 E., who shortly thereafter sold his possessory right and improvements to L. M. Rhodes, taking his (Rhodes') notes for $650, who could not meet the notes, and accordingly he relinquished his rights to William L. Powers, who offered to purchase lots 2, 7, 10, and 15 from said railroad company, and at the same time John G. Powers, a brother of William L. Powers, offered to purchase lots 3, 6, 11, and 14 from said company; that William L. Powers built a log cabin on lot 10 in 1879, plowed and planted about 6 acres to grain, and continued to cultivate it; that in 1885 he cleared lot 10 and part of lot 11, and raised two crops thereon; that in the spring of 1881 he built a house on lot 7 and moved into it in 1881, and has made it his home ever since; that on Sept. 1, 1879, said railroad company mortgaged lots 2, 7, 10, 15, 3, 6, 11, and 14, sec. 1, T. 16 N., R. 45 E., to the Farmers' Loan and Trust Company of New York City on July 13, 1887. Lots 2, 7, 10, and 15 were bargained, sold, and deeded to William L. Powers, and on August 4, 1887, lots 2, 3, 6, 11, and 14 were bargained, sold, and deeded to William L. Powers, and in the settlement William L. Powers took a relinquishment from John G. Powers of all his rights to lots 2, 7, 10, and 15. He (William L. Powers) paid said railroad company $1,249.28 for said eight lots.

You hold that the land in question is excepted from the operation

of the company's selection by reason of the settlement of said William L. Powers, and that the same should be held as public land and subject to his right to purchase under section 5 of the act of March 3, 1887 (24 Stat., 656), or act of January 13, 1881 (21 Stat., 315), and that Slaght settled on the land as the tenant of Powers.

14 The basis for your decision is not well founded:

1st. For the reason that Powers did not apply to purchase the land prior to the passage of the act of March 3, 1887 (*supra*).

2nd. Because no application to purchase under said act of January 13, 1881 (*supra*), has been made within the prescribed time; that he was not qualified to purchase under said act, not having exhausted his timber-culture right, and, besides, such application to purchase shall not cover more than 160 acres; and, again, it appears as an afterthought to secure title to this land under the latter-named act, as the same was purchased from the railroad company in 1887 under the grant of July 2, 1864 (*supra*).

Therefore, in view of this showing, your decision in favor of William L. Powers is hereby reversed, likewise your decision adverse to Jacob Slaght.

Your opinion that said company's selection as to this land was improperly allowed, and that the company had no right to the land prior to its selection, and as the same was occupied and improved as the home of a settler, Slaght's, at the date of selection, that such selection as to the land in question should be cancelled, — in accordance with the uniform practice of the department, and I concur therein.

Accordingly, said amendatory list No. 2 of selections of Dec. 17, 1883, by said company is hereby held for cancellation as to said lots 10, 11, 14, and 15, sec. 1, twp. 16 N., R. 45 E.

The usual time, sixty days after notice, will be allowed the railroad company and William L. Powers within which to appeal to the honorable Secretary of the Interior.

Should this decision become final, Slaght will be permitted to make homestead entry for this land. You will advise him of this action.

At the proper time you will make due report as to the action taken in the premises.

Messrs. Britton & Gray, the resident attorneys of said railroad company, will be advised hereof by this office.

Very respectfully.

(Signed) S. W. LAMOREUX,
Commissioner."

That thereafter the said Northern Pacific Railroad Company appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior; that the said Secretary of the Interior, on or about the — day of ——, 1896, affirmed the said decision of the Commissioner of the General Land Office, and thereafter, to wit, on the — day of ——, 1897, the officers of the Interior Department made, executed, and delivered to the said defendant,

Jacob Slaght, letters patent under the great seal of the United States, purporting to convey to the said defendant, Jacob Slaght, the said lots 10, 11, 14, and 15, in section 1, township 16 north of range 45 east, W. M., Washington; but plaintiffs further aver that said letters patent were issued under a misconstruction and misinterpretation of the law; that long prior to the settlement upon said land by the said
15 Jacob Slaght the said lands and each and all thereof had been reserved for the use and benefit of the said Northern Pacific Railroad Company, as hereinbefore set forth; that the plaintiff William L. Powers settled upon said lands with the intention of purchasing the same from the said Northern Pacific Railroad Company; that by reason of the premises the said land was subject to selection by said Northern Pacific Railroad Company at the time the same was selected by said company, as hereinbefore set forth, and that thereby the said Northern Pacific Railroad Company acquired the title in and to said described land, and at the time the said defendant, Jacob Slaght, applied to enter said land, and at the date of the said hearings in said contest hereinbefore set forth, and at the date of the issuance of said letters patent, as aforesaid, the said land was not, nor was it at any of said times, public land subject to settlement or entry under the land laws of the United States other than the said act of Congress approved July 2, 1864, granting lands to the said Northern Pacific Railroad Company, and that the said officers of the Interior Department of the United States were without authority to issue said letters patent purporting to convey the said land to the said defendant, Jacob Slaght, because the said United States had long prior to the issuance of said letters patent parted with the title to the said described lands and each and all thereof to the said Northern Pacific Railroad Company. Plaintiffs further aver that in the rendition of the said decision by the Commissioner of the General Land Office and by the Secretary of the Interior, as hereinbefore set forth, the said officers of the Interior Department misconceived and misconstrued the law, and the same or any part thereof is not the law.

XI.

Plaintiffs further aver that the said plaintiffs, Hattie Dean,
16 Edward Deane, F. S. Bell, Ivan Chase, J. R. Malhern, John K. McCornack, Ann J. Clyde, Spokane & Palouse Railway Company, Spokane & Palouse Land Company, Palouse Mill Company, and A. F. Pugh, assert and claim title to certain portions of the said lands hereinbefore described under and by virtue of certain instruments in writing duly made, executed, and delivered to them by the said plaintiff, William L. Powers, and his grantees, conveying to them, the plaintiffs last above named, certain lots and parcels of the said land hereinbefore described.

XII.

Plaintiffs further aver that the said plaintiff, William L. Powers, has heretofore and by his certain instruments in writing, duly

made, executed, and delivered, conveyed certain other portions of said described land to various parties, and has in said instruments of writing covenanted and agreed to and with the said grantees therein named that he would warrant and defend the title so conveyed to the said grantees.

XIII.

That the questions involved and to be determined in this action are of common and general interest to many persons, and the parties interested herein are so numerous that it is impracticable to bring them before the court.

XIV.

That plaintiffs and said numerous other persons are the owners in fee simple and have an indefeasible title and are in possession of the following-described premises, in the county of Whitman, in the State of Washington, to wit, lots 10, 11, 14, and 15, section 1, in township 16 north of range 45 east of the Willamette meridian, and that said defendant claims an interest or estate therein adverse to the said plaintiffs, which said claim of defendant is without any right whatever, and said defendant has not any estate, right, title, or interest whatever in said land or premises or any part thereof.

17 XV.

That defendant is threatening to commence divers and sundry suits in ejectment, and without suit forcibly to dispossess and eject plaintiffs and said numerous other parties of and from said premises or a portion thereof, and unless enjoined and restrained by an order of this honorable court will so bring said suits, and will also without suit forcibly enter said premises and with force and without any right whatever eject and dispossess plaintiffs and said numerous other parties; that thereby a multiplicity of suits will be caused, and great costs and injuries inflicted upon these plaintiffs and said divers and numerous other parties having a common and general interest with plaintiffs in and to the said premises or some part thereof, and that thereby the courts of this State will be greatly and unnecessarily burdened, and great and irreparable injury will be wrought to these plaintiffs and said numerous other parties having common and general interest in the questions involved herein.

Wherefore plaintiffs pray:

1. That said defendant may be enjoined and restrained from selling or attempting to sell the lands hereinbefore described or any part thereof, and from bringing separate or independent suits against these plaintiffs or against any other person or persons interested in the questions or the premises and property hereinbefore described or any part thereof, and from seeking to eject or dispossess, with or without suit, said plaintiffs or said other persons or any or either of them from said lands or from any part thereof.

2. That a preliminary restraining order and injunction may be issued enjoining and restraining the said defendant, as aforesaid, until the final determination of this suit.

3. That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by a decree of this court.

18 4. That by said decree it be declared and adjudged that the defendant has no estate, right, title, or interest whatever in or to said land and premises or any part thereof, and that the title of plaintiffs and said numerous other persons and parties having a common and general interest in and to said premises or a portion thereof be decreed good, valid, indefeasible fee-simple, and free from all claims of said defendant.

5. That defendant be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to plaintiffs and said other parties, and the alleged claims of defendants be cancelled, for naught held, and be decreed null and void, and defendant be required to surrender the same and be required to convey said alleged claims to plaintiffs and said other persons.

6. That the said letters patent issued to the said Jacob Slaght, as aforesaid, may be declared to have been issued under a misconstruction of the law and to be void and to constitute clouds upon the titles of these plaintiffs and of the various persons to whom the said plaintiff, William L. Powers, has conveyed any portion of the said land, as aforesaid.

7. That the said defendant, Jacob Slaght, may be decreed to be a trustee holding such right, title, and interest in and to said lands as he may have acquired under and by virtue of said letters patent, as aforesaid, if any, for the benefit of the said plaintiff, William L. Powers, and his grantee, both direct and through mesne conveyances, and that the said defendant, Jacob Slaght, may be required to convey such right, title, and interest, if any, to the said plaintiff, William L. Powers, and his grantees, as aforesaid.

8. For such other and further relief in the premises as shall to the court seem meet, proper, and agreeable to equity.

9. That plaintiffs may have judgment for their costs and

19 disbursements in this action.

STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiffs.

STATE OF WASHINGTON, } ss:
County of Spokane, }

F. D. Gibbs, being first duly sworn, upon oath deposes and says—That he is an officer of the said plaintiff, Spokane & Palouse Railway Company, to wit, its general agent, located at the city of Spokane, Washington; that said corporation, Spokane & Palouse Railway Company, is one of the plaintiffs in the above-entitled action, and affiant makes this affidavit for and on behalf of said plaintiff; that affiant has heard read the foregoing second amended complaint and knows the contents thereof, and that the same is true, as he verily believes.

F. D. GIBBS.

Subscribed and sworn to before me this 19th day of February, 1898.

[SEAL.] E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

(Copy.)

(Indorsed:) Filed Feb'y 23rd, 1898. C. A. Ross, clerk.

20 In the Superior Court of the State of Washington in and for Whitman County.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD DEAN, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company, a Corporation; Spokane & Palouse Land Company, a Corporation; Palouse Mill Company, a Corporation, and A. F. Pugh, Plaintiffs,

vs.

JACOB SLAGHT.

Comes now the defendant, by his undersigned attorneys, and demurs to plaintiffs' second amended complaint herein for the following reasons, to wit:

1st. That the same does not state facts sufficient to constitute a cause of action against this defendant.

2nd. That there is a defect of parties plaintiff appearing therein.

3rd. That there is a defect of parties defendant appearing therein.

4th. That several causes of action have been improperly united therein.

5th. That the action has not been commenced within the time limited by law.

WYMAN & NEILL AND
W. E. McCROSKEY,
Attorneys for Defendant.

I certify that the foregoing is a true copy of the original demurrer hereby served on you.

CHARLES M. WYMAN.

(Indorsed:) Filed in the office of the clerk of the superior court this 8 day of Aug., 1898. C. A. Ross, clerk.

21 In the Superior Court of the State of Washington for Whitman County.

WILLIAM L. POWERS, HATTIE DEAN, Edward Deane, F. C. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company, a Corporation; Spokane & Palouse Land Company, a Corporation; Palouse Mill Company, a Corporation, and A. F. Pugh, Plaintiffs, *v.* JACOB SLAGHT, Defendant.	Order of Dismissal.

The demurrer of defendant to second amended complaint of plaintiffs herein came on regularly for hearing and determination on the 13th day of June, 1898, and plaintiffs and defendant appearing, by their respective counsel, and after argument, and the court being fully advised in the premises, it was ordered that the said demurrer be, and the same is hereby, sustained.

Whereupon plaintiffs announced that they desire to stand upon their second amended complaint, and decline to further plead. Thereupon defendant moved the court for an order dismissing the action of plaintiffs herein; which motion was granted by the court. Plaintiffs excepted to the order and ruling of the court sustaining said demurrer, also to the ruling and order of the court sustaining a motion of defendant to dismiss the above-entitled action; which objections were, and they are hereby, allowed by the court.

Wherefore it is ordered and adjudged by the court that the above-entitled action be, and the same is hereby, dismissed at plaintiffs' costs, and that defendant do have and recover of and from plaintiffs his costs and disbursements herein taxed at seventeen dollars.

Done in open court this 15th day of June, 1898.

(Signed) WM. McDONALD, *Judge.*

(Copy.)

(Indorsed:) Filed June 17th, 1898. C. A. Ross, clerk.

22 In the Superior Court of the State of Washington for Whitman County.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD Deane, F. C. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company, a Corporation; Spokane & Palouse Land Company, a Corporation: Palouse Mill Company, a Corporation, and A. F. Pugh, Plaintiffs,
v.
JACOB SLAGHT, Defendant.
} Notice of Appeal.

To the above-named defendant, Jacob Slaght, and to Wyman & Neill and W. F. McCroskey, your attorneys:

You and each of you are hereby notified that the above-named plaintiffs do hereby appeal to the supreme court of the State of Washington from that certain order and final judgment rendered and entered herein on the 15th day of June, 1898, which order and judgment is in favor of defendant and against plaintiffs, and which said order and final judgment is one sustaining the demurrer of the defendant to plaintiffs' second amended complaint and dismissing the action of plaintiffs herein and judgment for costs in favor of defendant and against plaintiffs, and from the whole and every part of said order and final judgment.

Dated this 21st day of June, 1898.

STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiffs.

(Indorsed:) Due service of within notice of appeal by receipt of a true copy thereof admitted this 24th day of June, 1898. Wyman & Neill & W. E. McCroskey, attorneys for defendant. Filed June 24, 1898. C. A. Ross, clerk, by Walter Ruble, deputy clerk.

23 In the Superior Court of the State of Washington for Whitman County.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD Deane, F. C. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company, a Corporation; Spokane & Palouse Land Company, a Corporation; Palouse Mill Company, a Corporation, and A. F. Pugh, Plaintiffs,
v.
JACOB SLAGHT, Defendant.
} Bond on Appeal.

Know all men by these presents that the undersigned, for and on behalf of each and all the above-named plaintiffs, does hereby bind himself, his heirs, executors, administrators, and assigns, unto

the above-named defendant, Jacob Slaght, in the sum of two hundred dollars ($200).

The condition of the above obligation is such that whereas the above-named plaintiffs have appealed to the supreme court of the State of Washington from that certain order and final judgment made and entered in the above entitled action on the 15th day of June, 1898, which said order and final judgment is in favor of defendant and against said plaintiffs:

Now, therefore, if the said plaintiffs (appellants) shall and will pay all costs and damages that may be awarded against them or either of them on the said appeal or on the dismissal thereof, not exceeding two hundred dollars, then and in that event this obligation to become null and void; otherwise to be and remain in full force and effect.

Dated this 21st day of June, 1898.

F. H. MASON. [SEAL.]

(Copy.)

24 STATE OF WASHINGTON, } ss:
County of Spokane, }

F. H. Mason, being first duly sworn, upon oath deposes and says:

That he is the party who made and executed the above and foregoing bond for and on behalf of the above-named plaintiffs and for the purpose of effecting and perfecting an appeal in the above-entitled action; that he is a resident of the county of Spokane, State of Washington, and is worth the sum of two hundred dollars over and above all debts and liabilities in separate property within the State of Washington, exclusive of property exempt from execution.

F. H. MASON.

Subscribed and sworn to before me this 21st day of June, 1898.

E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

(Indorsed:) Due service of within bond on appeal, by receipt of a true copy thereof, admitted this 24th day of June, 1898. Wyman & McNeill & W. E. McCroskey, attorney- for defendant. Filed June 24, 1898. C. A. Ross, clerk, by Walter Ruble, deputy.

25 STATE OF WASHINGTON, } ss:
County of Whitman, }

I, C. A. Ross, clerk of the superior court of said county and State, do hereby certify that the foregoing is a true, full, and correct transcript of so much of the records and files in the above-entitled cause as I have been directed by the appellant to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and seal of said superior court this 18th day of August, A. D. 1898.

[SEAL.] C. A. ROSS, *Clerk*,
By WALTER RUBLE, *Deputy*.

(Revenue stamp.)

(Indorsed:) Filed Aug. 22, 1898. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

26 WILLIAM L. POWERS ET AL., Appellants, *vs.* JACOB SLAGHT, Respondent. } No. 3042. Filed Dec. 5th, 1898.

Per Curiam:

This case falls within the rule of Moore *vs.* Cormode, and is accordingly affirmed.

27 In the Supreme Court, State of Washington.

SATURDAY, *January 14th*, 1899.

WILLIAM L. POWERS ET AL., Appellants, *vs.* JACOB SLAGHT, Respondent. } No. 3042. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record in the superior court of Whitman county, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 14th day of January, A. D. 1899, on motion of Wyman & Neill, of counsel for respondent, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed, with costs, and that the said Jacob Slaght have and recover of and from the said William L. Powers *et al.* and from F. H. Mason, surety, the costs of this action, taxed and allowed at eighty-eight and $\frac{75}{100}$ dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

28 STATE OF WASHINGTON:

In the Supreme Court.

WILLIAM L. POWERS, HATTIE DEAN, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a Corporation), Spokane & Palouse Land Company (a Corporation), Palouse Mill Company (a Corporation), and A. F. Pugh, Plaintiffs in Error, vs. JACOB SLAGHT, Defendant in Error.	Assignments of Error.

Now comes the above-named plaintiffs in error, William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh, by C. W. Bunn, James B. Kerr, and H. M. Stephens, their attorneys, and assign the following errors in the judgment of this court herein:

I.

The court erred in its judgment that the complaint of the plaintiffs in error be dismissed.

II.

The court erred in its judgment sustaining the demurrer of the defendant in error to the complaint of the plaintiffs in error herein.

III.

The court erred in its judgment wherein and whereby it decided that the plaintiffs in error were not the owners of the land in controversy.

IV.

The court erred in its judgment wherein and whereby it decided that the plaintiffs in error were not entitled to judgment
29 canceling the patent of the defendant in error and adjudging plaintiffs in error to be the owners of the premises in controversy.

V.

The court erred in its judgment wherein and whereby it decided that the patent of the United States issued to the defendant in error conveyed to him the legal and equitable title to the premises in controversy.

VI.

The court erred in failing to hold and decide that the plaintiffs in error were the owners and entitled to the possession of the

premises in controversy under and by virtue of the conveyance to said plaintiffs in error from the Northern Pacific Railroad Company.

VII.

The court erred in failing to hold and decide that the Northern Pacific Railroad Company became the owner of the premises in controversy by virtue of the act of Congress approved July 2, 1864, granting lands to aid in the construction of the Northern Pacific railroad.

VIII.

The court erred in failing to hold that the Northern Pacific Railroad Company became the owner of the premises in controversy by virtue of its selection thereof under said act of Congress of July 2, 1864.

IX.

The court erred in failing to hold and decide that the premises in controversy were public land of the United States, free from preemption or other claims or rights and subject to the grant to said Northern Pacific Railroad Company under said act of Congress of July 2, 1864, at the date of selection, to wit, December 17th, 1883.

30 X.

The court erred in failing to hold that the selection of the premises in controversy by the Northern Pacific Railroad Company on December 17th, 1883, was in compliance with said act of July 2, 1864, and the directions of the Secretary of the Interior, and operated to appropriate said premises to said Northern Pacific Railroad Company under said grant.

XI.

The court erred in holding and deciding that the occupancy of the premises in controversy by the defendant in error on the date of the selection thereof by the Northern Pacific Railroad Company constituted such a claim thereto as prevented the attachment of the grant to said Northern Pacific Railroad Company upon selection.

XII.

The court erred in failing to hold and decide that the premises in controversy were appropriated to and passed to the Northern Pacific Railroad Company upon the definite location of its road under said act of July 2, 1864, for the reason that all of the lands in the indemnity limits were insufficient to satisfy the losses from the place limits of its said grant.

XIII.

The court erred in failing to hold and decide that the premises in controversy were withdrawn from sale, homestead and pre emption entry by virtue of the provisions of said act of July 2, 1864, from

and after February 21, 1872, when the general route of said Northern Pacific railroad was fixed.

XIV.

The court erred in failing to hold and decide that the premises in controversy were withdrawn from sale, homestead and pre-emption entry by virtue of the provisions of said act of July 2, 1864, from and after October 4, 1880, when the line of said Northern Pacific railroad was definitely located.

31

XV.

The court erred in failing to hold and decide that the premises in controversy were withdrawn from sale, homestead and pre-emption entry from and after November 13, 1880, by virtue of the withdrawal thereof by the Commissioner of the General Land Office.

XVI.

The court erred in failing to hold and decide that the Land Department of the United States committed an error of law in awarding the premises in controversy to the defendant in error, and allowing homestead entry thereof, and in cancelling the selection of the Northern Pacific Railroad Company.

XVII.

The court erred in holding that the patent issued to the defendant in error concluded and determined the rights of the parties herein.

WILLIAM L. POWERS,
HATTIE DEAN,
EDWARD DEANE,
F. S. BELL,
IVAN CHASE,
JOHN K. McCORNACK,
ANN J. CLYDE,
SPOKANE & PALOUSE RAILWAY COMPANY (A CORPORATION),
SPOKANE & PALOUSE LAND COMPANY (A CORPORATION),
PALOUSE MILL COMPANY (A CORPORATION),
A. F. PUGH, *Defendants in Error,*
By C. W. BUNN,
JAMES B. KERR,
H. M. STEPHENS, *Their Attorneys.*

Dated February 23rd, 1899.

(Indorsed:) Filed Mar. 2, 1889. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

32 STATE OF WASHINGTON:

In the Supreme Court.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD DEANE, F. S. BELL, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a Corporation), Spokane & Palouse Land Company (a Corporation), Palouse Mill Company (a Corporation), and A. F. Pugh, Plaintiffs in Error,

vs.

JACOB SLAGHT, Defendant in Error.

Now come the above-named William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh, plaintiffs in error, and pray that a writ of error in the above-entitled cause may issue to the said supreme court of the State of Washington to review a certain judgment entered in said court on the 14th day of January, 1899, in favor of said Jacob Slaght, defendant in error, and against the said William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh, plaintiffs in error, and dismissing the complaint of the plaintiffs in error, William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of Washington, to the great damage of said plaintiffs in error; all of which will more in detail appear from the assignment of errors
33 which is filed with this petition.

WILLIAM L. POWERS,
HATTIE DEAN,
EDWARD DEANE,
F. S. BELL,
IVAN CHASE,
JOHN K. McCORNACK,
ANN J. CLYDE,
SPOKANE & PALOUSE RAILWAY COMPANY (A CORPORATION),
SPOKANE & PALOUSE LAND COMPANY (A CORPORATION),
PALOUSE MILL COMPANY (A CORPORATION),
A. F. PUGH, *Plaintiffs in Error,*
By C. W. BUNN,
JAMES B. KERR,
H. M. STEPHENS, *Their Attorneys.*

Dated Feb'y 23rd, 1899.

(Indorsed:) Filed Mar. 2, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

34 Know all men by these presents that we, Howell W. Peel and R. L. Rutter, of the city of Spokane, county of Spokane, State of Washington, are firmly bound unto Jacob Slaght, of the county of Garfield, in the State of Washington, in the full and just sum of two hundred and fifty (250) dollars, to be paid to the said Jacob Slaght, his heirs, representatives, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, in the supreme court of the State of Washington, in a suit pending in said court between William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh, plaintiffs, and Jacob Slaght, defendant, judgment was rendered against the said plaintiffs, William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid cause, and the citation directed to the said Jacob Slaght, defendant, citing and admonishing him to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, on or before the first day of May, 1899:

Now, the condition of the above obligation is such that if
35 the said William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

HOWELL W. PEEL. [SEAL.]
R. L. RUTTER. [SEAL.]

Sealed and delivered in presence of—

E. T. WHITE.
H. M. STEPHENS.

STATE OF WASHINGTON, } ss.:
County of Spokane, }

Howell W. Peel and R. L. Rutter, being first duly sworn, each for himself, and not one for the other, deposes and says that he is one of the parties who made and executed the above and foregoing bond for and on behalf of William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh, plaintiffs in error in the cause mentioned therein, and for the purpose of effecting and perfecting a writ of error therein; that he is a resident of the county of Spokane, State of Washington, and is worth the sum of two hundred and fifty (250) dollars over and above all debts and liabilities, in separate property within the State of Washington, exclusive of property exempt from execution.

HOWELL W. PEEL.
R. L. RUTTER.

Subscribed and sworn to before me this 24th day of February, 1899.

E. T. WHITE,
[SEAL.] *Notary Public in and for the State of Washington, Residing at Spokane, Washington.*

36 The foregoing bond is approved as to form and sufficiency.

MERRITT J. GORDON,
Chief Justice of the Supreme Court of Washington.

(Indorsed:) Filed Mar. 2, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

37 UNITED STATES OF AMERICA:

The President of the United States to the honorable supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in a suit between William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh, plaintiffs, and Jacob Slaght, defendant, wherein was drawn in question the validity of a statute or an authority exercised under the United States and the decision was against its validity, a manifest error hath intervened, to the great damage of the said William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J.

Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh, as by their complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, on the District of Columbia, within sixty days from the date hereof that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what
of right and according to the laws and customs of the
38 United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 2nd day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States
for the District of Washington.

The above writ is hereby allowed.

MERRITT J. GORDON,
Chief Justice of Supreme Court of Washington.

39 [Endorsed:] 3042. State of Washington. In supreme court. William L. Powers *et al.*, plaintiffs in error, *vs.* Jacob Slaght, defendant in error. Writ of error. Filed March 3, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy. C. W. Bunn, James B. Kerr, H. M. Stephens, attorneys for plaintiffs in error.

40 United States of America to Jacob Slaght, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Washington, wherein William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company (a corporation), Spokane & Palouse Land Company (a corporation), Palouse Mill Company (a corporation), and A. F. Pugh were plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Merritt J. Gordon, chief justice of the supreme court of the State of Washington, this second day of March,

in the year of our Lord one thousand eight hundred and ninety-nine.

MERRITT J. GORDON,
Chief Justice of the Supreme Court of Washington.

41 *Sheriff's Return of Service.*

Case No. —.

STATE OF WASHINGTON, } ss:
County of Whitman, }

I, Joseph Canutt, sheriff in and for said county and State, do hereby certify that I served the within citation on Wyman & Neill, attorneys for the within-named defendant, in Whitman county, State of Washington, on the 8th day of March, 1899, by delivering to and leaving with Thomas Neill, one of attorneys for said defendant, personally a true copy of said citation, certified to be such true copy by affiant.

Returned this 8th day of March, 1899.

JOSEPH CANUTT,
Sheriff of Whitman County, Washington,
By —— ——, *Deputy.*

Sheriff's Fees.

Copying	$
Service	
Mileage	
	$ .80

Subscribed and sworn to before me this 8 day of March, 1899.

[Seal of Auditor of Whitman County, State of Washington.]

W. B. HARGRAVE,
Deputy Auditor Whitman County, Washington.

42 *Sheriff's Return of Service.*

Case No. —.

STATE OF WASHINGTON, } ss:
County of Whitman, }

I, Joseph Canutt, sheriff in and for said county and State, do hereby certify that I served the within citation on Jacob Slaght, the within-named defendant, in Whitman county, State of Washington, on the 8th day of March, 1899, by delivering to and leaving with Jacob Slaght, the said defendant, personally a true copy of said citation, certified to be such true copy by affiant.

Returned this 8th day of March, 1899.

JOSEPH CANUTT,
Sheriff of Whitman County, Washington,
By G. B. CARTER, *Deputy.*

Sheriff's Fees.

Copying	
Service	.60
Mileage	5.40
	$6.00

Subscribed and sworn to before me this 9 day of March, 1899.

[Seal of Auditor of Whitman County, State of Washington.]

W. B. HARGRAVE,
Deputy Auditor of Whitman County, Washington.

43 [Endorsed:] 3042. State of Washington. In supreme court. William L. Powers *et al.*, plaintiffs in error, *vs.* Jacob Slaght, defendant in error. Citation. C. W. Bunn, James B. Kerr, H. M. Stephens, attorneys for plaintiffs in error. Filed Mar. 13, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

44 In the Supreme Court, State of Washington.

William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern; Spokane & Palouse Railway Company, a Corporation; Spokane & Palouse Land Company, a Corporation; Palouse Mill Company, a Corporation, and A. F. Pugh, Plaintiffs, *v.* Jacob Slaght, Defendant.	Certificate Clerk of Supreme Court.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above-entitled cause, and that in pursuance of the writ of error filed herein I now transmit the same, together with the original writ of error, the original citation, and a copy of the bond on appeal and of the assignment of errors, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 14th day of April, 1899.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

[Ten-cent U. S. internal-revenue stamp.]

Endorsed on cover: File No., 17,393. Washington supreme court. Term No., 283. William L. Powers, Hattie Dean, Edward Deane, *et al.*, plaintiffs in error, *vs.* Jacob Slaght. Filed May 4th, 1899.

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SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 283.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD DEANE, F. S. BELL, IVAN CHASE, JOHN K. McCORNACK, ANN J. CLYDE, J. R. MALHERN, SPOKANE & PALOUSE RAILWAY COMPANY, a Corporation; SPOKANE & PALOUSE LAND COMPANY, a Corporation; PALOUSE MILL COMPANY, a Corporation, and A. F. PUGH,

Plaintiffs in Error,

vs.

JACOB SLAGHT.

ARGUMENT FOR PLAINTIFFS IN ERROR.

This case is before the court on a writ of error directed to the supreme court of Washington. The action was commenced in the superior court of Whitman county, Washington, to cancel a patent

issued to the defendant under the Homestead Law purporting to convey title to lots 10, 11, 14 and 15 of section one (1), township sixteen (16) north, range forty-five (45) east of the Willamette Meridian, a tract of land situated within the indemnity limits of the Northern Pacific grant.

The title of the plaintiffs is derived by purchase from the Northern Pacific Railroad Company under its grant by act of congress, approved July 2, 1864 (13 Stat. 365).

The supreme court of Washington sustained a demurrer to the complaint and entered judgment dismissing the action.

The complaint alleges that by the third section of the act of congress, approved July 2, 1864, lands were granted to the Northern Pacific Railroad Company as follows:

"*And be it further enacted,* That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the

commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted,or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." (Transcript, p. 1).

It is then alleged that on October 4, 1880, the Northern Pacific Company definitely located that portion of its road opposite the premises in controversy by filing a map of such definite location, approved by the secretary of the interior, in the office of the commissioner of the general land office (Transcript p. 3); that upon a definite location the land in question fell within the 40-50 mile or indemnity limits of the grant; that upon such definite location the commissioner of the general land office withdrew from sale, homestead and pre-emption entry all the odd-numbered sections within the indemnity limits opposite that portion of the line so located; that this order of withdrawal was received at the United States district land office at Colfax, Washington, November 30, 1880 (Transcript p. 3).

It is alleged that the land in controversy was at the date of definite location and at the date of withdrawal public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights (Transcript p. 3).

The complaint then alleges that on December 15,

1883, the railroad company selected the land in controversy, under the directions of the secretary of the interior, as indemnity in lieu of lands excepted from the primary limits of the grant and filed its selection list and paid the fees in the manner required by law and by the regulations of the interior department; that the district land officers on December 17, 1883, allowed and approved said selection list and transmitted the same to the commissioner of the general land office (Transcript p. 5).

The complaint alleges that after the selection and in the year 1887 the railroad company conveyed the land to the plaintiff, William L. Powers (Transcript, p. 6).

It is then alleged that thereafter and on October 26, 1887, for the purpose of complying with the other instructions of the interior department issued subsequent to the selection, the railroad company filed a certain list, designating the losses in lieu of which the land in controversy had been selected in December, 1883, and thereafter in 1892 and 1893, in compliance with certain further instructions the losses specified in 1887 were rearranged, tract for tract, with the lands so selected and that it appears, from said rearranged list, that the lands in controversy were selected in lieu of an equal quantity of land situated within the forty mile or primary limits of the grant within the state of Washington and at the date of the definite location included within a reservation set apart for the Yakima Indians (Transcript p. 6)

It is then alleged that the plaintiff, William L. Powers settled on the land in controversy in 1881 with the intention of purchasing the same from the railroad company, and on March 1, 1883, leased lot 10 of the land in controversy to the defendant Jacob Slaght, who occupied the premises and paid rent to Powers until 1887. On October 31, 1887, however, Slaght presented his application at the district land office to make homestead entry of the whole of the premises in controversy (Transcript p. 7). Upon this application of the defendant a hearing was ordered before the district land officers to determine the status of the land at the date of selection and in July, 1889 the register and receiver rendered their decision and held that the land was excepted from the operation of the grant by reason of the settlement of the plaintiff William L. Powers, and that the said defendant Slaght settled on the land as the tenant of Powers (Transcript pp. 7-8). From this decision the railroad company appealed to the commissioner of the general land office and that officer on April 13, 1895, rendered a decision, set out at length in the complaint, in which he reviews the testimony offered before the register and receiver and holds that the railroad company's selection should be cancelled solely upon the ground that the premises in controversy were occupied by the defendant Slaght at the date of selection, notwithstanding the fact that Slaght was a tenant of Powers and notwithstanding the fact that the land was withdrawn from homestead

and pre-emption by the executive order of November 30, 1880 (Transcript pp. 8 to 10).

Thereafter the railroad company appealed to the secretary of the interior, who affirmed the decision of the commissioner, and in the year 1897 patent was issued to the defendant, purporting to convey the land in controversy. (Transcript p. 10).

The complaint alleges that the officers of the land department committed an error of law in cancelling the selection and issuing the patent to the defendant (Transcript p. 11).

It is further alleged that the plaintiffs, other than William L. Powers, claim title to certain portions of the lands which comprise a portion of the town site of Palouse City, under conveyances made to them by William L. Powers and his grantees and that the plaintiff, William L. Powers, has conveyed to various persons certain other portions of the land in controversy and by his deeds of conveyances has covenanted and agreed that he will warrant and defend the title so conveyed (Transcript pp. 11-12).

It is further alleged that the plaintiffs and the various grantees of William L. Powers are in possession of the premises in controversy and that the defendant is threatening to commence numerous actions at law to dispossess the plaintiffs and is also threatening to enter upon said premises, forcibly and without right, and dispossess the said plaintiffs and the other grantees of the said William L. Powers (Transcript p. 12).

The complaint concludes with a prayer that the defendant may be enjoined from bringing separate suits against the plaintiffs or persons claiming under William L. Powers, and that the patent issued to the defendant may be decreed to be void and cancelled as a cloud upon the title of the plaintiffs, or that the defendant may be decreed to hold the legal title in trust for the benefit of said William L. Powers and his grantees (Transcript pp. 12-13).

To this complaint the defendant interposed a demurrer, specifying numerous grounds, among others, that the complaint does not state facts sufficient to constitute a cause of action (Transcript p. 14).

The supreme court of Washington sustained the demurrer upon the ground above specified without considering the other grounds, affirming the judgment of the superior court for Whitman county and dismissed the action. No opinion was filed, but the case was decided upon a memorandum referring to the opinion in *Moore v. Carmode,* No. 285 on the present calendar and heard in argument with the case at bar (Transcript p. 18).

ASSIGNMENT OF ERRORS.

Errors are duly assigned in the record (Transcript, pp. 19-21) but may be briefly stated, as follows:

I.

The court erred in sustaining the demurrer to the complaint and in entering judgment dismissing the action.

II.

The court erred in holding that the patent issued to the defendant is conclusive of the rights of the parties.

III.

The court erred in holding that no rights were acquired by virtue of the selection of the premises under act of congress approved July 2, 1864.

IV.

The court erred in holding that the settlement of the defendant excepted the land in controversy from the grant to the Northern Pacific Railroad Company.

V.

The court erred in holding that the withdrawal of the land in controversy was void.

VI.

The court erred in failing to hold that the title of plaintiffs was initiated prior to the title of defendant.

VII.

The court erred in denying plaintiffs' title to the land in controversy claimed under the act of congress approved July 2, 1864.

MERE OCCUPATION WAS INSUFFICIENT TO DEFEAT THE GRANT.

It appears from the decision of the commissioner of the general land office, set out at length in the complaint, that the selection of the railroad company was cancelled upon the sole ground of the occupancy of the premises by the defendant at the date of selection.

It is submitted that it sufficiently appears that this occupation by the defendant was as the tenant of William L. Powers, who intended to, and in fact did, purchase the land from the railroad company; but in any event, whatever was the nature of the settlement of the defendant it affirmatively appears that his first application to enter the land was made on May 31, 1887, nearly four years after the selection by the railroad company.

It is submitted that the law was settled by this court in *Northern Pacific Railroad Company v.*

Colburn, 164 U. S. 383, that mere settlement without a filing or entry creates no claim within the meaning of the Northern Pacific grant.

In that case Colburn sued the Northern Pacific Company to recover a sum of money paid by him as contract price on a tract of land sold to him by the company, alleging that the company had no title to the land and that it was excepted from the grant. The company answered, alleging that the land was within the primary limits of its grant and at the date of the grant and the date of definite location when its rights attached, the records of the land office showed no preemption, homestead or other claims or rights; but admitted that at the date of definite location one Kelly was occupying and cultivating the land, but that he had made no entry or filing in the local land office. The supreme court of the state (Montana) sustained the demurrer to the answer, on the ground that it appeared that the land department had held the tract to be excepted from the grant. Mr. Justice Brewer, delivering the opinion of the court, said:

"In this we think the learned court erred. The facts set up in the answer in reference to the land grant, the filing of the map of the line of general route and also that of definite location, the situation of the land and its freedom from record claims, were such as to prima facie vest a title in the company. It is true, it is also disclosed by the answer that one Kelly was in occupation, or at least cultivating the land at the time of the filing of the map of definite location, and the decision of the land department as to that fact undoubtedly concludes both parties. And if it be true, as matter of law, that mere occupation or cultivation of the prem-

ises at the time of the filing of the map of definite location unaccompanied by any filing of a claim in the land office, then or thereafter, excludes the tract from the operation of the land grant, the decision of the supreme court of Montana was right. But frequent decisions of this court have been to the effect that no preemption or homestead claim attaches to a tract until an entry in the local land office. Thus in the case of *Kansas Pacific Railway v. Dunmeyer,* 113 U. S. 629, 644, Mr. Justice Miller, speaking for the court, said:

"'Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into a perfect title by future residence and cultivation.'

"This language was quoted and the decision reaffirmed in *Hastings & Dakota Railroad v. Whitney,* 132 U. S. 357; *Whitney v. Taylor,* 158 U. S. 85. In *Lansdale v. Daniels,* 100 U. S. 113, 116, it was ruled that 'such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that the settlement alone is not sufficient for that purpose.' See also *Maddux v. Burnham,* 156 U. S. 544. Now, in this case the allegations are that Kelly never made any entry in the local land office and the decision of the secretary of the interior is based simply on the fact of occupation and cultivation. And while the decision of that fact may be conclusive between the parties his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties and which is open to review in the courts."

And in conclusion said further: "For the reasons above indicated, because the decision of the

land department was only on matters of fact and did not include the law of the case, and as such *facts so found were not of themselves sufficient to disturb the title of the railroad company,* the judgment is reversed and the case remanded to the supreme court of the state for further proceedings not inconsistent with this opinion."

Counsel for defendants urge with much earnestness that the question of the effect of mere occupancy was not presented in the Colburn case. The language of the opinion seems too plain to justify argument upon this contention, but it may be observed in reply that the suggestion finds a conclusive answer in the denial by the court of the motion to dismiss for the lack of a federal question. The answer of the railroad company to the complaint of Colburn set up facts showing the land was free and clear at definite location, admitting the occupancy of Kelly. Upon these facts the state court denied the title claimed by the company under the federal grant. This court held that the effect of Kelly's settlement presented a federal question and held further that the effect of the occupancy was not to defeat the grant.

And this is the construction of the opinion upon which the interior department has acted since the decision was annnounced.

Wight v. Central Pacific R. R. Co., 27 L. D. 182; *Central Pacific R. R. Co. v. Hunsaker*, 27 L. D. 297; *Union Pacific R. R. Co. v. Grant*, 28 L. D. 18; *Union Pacific R. R. Co. v. Fisher*, 28 L. D. 75, 83.

The supreme court of Minnesota has also acted

upon this plain construction of the Colburn case. *McHenry v. Nygaard*, 72 Minn. 2.

THE WITHDRAWAL.

It appears by the complaint that the officers of the land department committed a further error of law in canceling the selection of the railroad company and allowing the entry of the defendant, for the reason that during the whole period of the defendant's occupation of the premises the land was withdrawn from preemption and homestead entry.

If the lands were withdrawn up to the time of the selection by the railroad company, no rights could be acquired under the public land laws which would defeat the selection. Sections 2257 and 2258 of the Revised Statutes of the United States provide what lands shall be subject to the right of preemption, and what lands may not be acquired in this manner. These sections are as follows:

Section 2257: "All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of preemption, under the conditions, restrictions, and stipulations provided by law."

Section 2258: "The following classes of lands, unless otherwise especially provided for by law, shall not be subject to the rights of preemption, to-wit:

First: *Lands included in any reservation by any treaty, law, or proclamation of the president, for any purpose.*

Second: Lands included within the limits of any incorporated town, or selected as the site of a city or town.

Third: Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

Fourth: Lands on which are situated any known salines or mines."

Lands withdrawn from entry by order of the commissioner of the general land office are lands included in a reservation by "proclamation of the president" and fall within the first exception to section 2258 supra. *Wolsey v. Chapman,* 101 U. S. 755, 769.

It is well settled that where the executive officers of the government attempt to dispose of lands under the preemption law which fall within these exceptions, they act beyond their jurisdiction and their acts are void, and a patent issued upon an entry of land not subject to the jurisdiction of the land department does not pass the legal title and such a patent may be challenged in an action at law. This was the conclusion reached in *Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.,* 163 U. S. 321.

This was an action of ejectment brought to recover possession of certain islands in the Mississippi river and within the corporate limits of the city of Minneapolis. The plaintiff relied upon a patent of the United States, purporting to convey the land in question, based upon a soldier's additional homestead entry. The patent was dated

June 13, 1884, and the plaintiff's right was initiated March 27, 1883, on which latter date he applied to enter the land in question. The land department allowed the entry and issued patent, and it was insisted at the trial, upon the part of the plaintiff, that the determination by the land department that the land in question was subject to entry at the date when the patentee's right was initiated was conclusive. The court conceded that where the patentability of public lands depends upon questions of fact which are committed to the consideration and determination of the land department, such determination is final, as, for instance, the determination by the department that a certain tract is swamp land or saline land or mineral land. The court says, however:

"But it is also equally true that when, by act of congress, a tract of land has been reserved from homestead and preemption or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in patent, transfer no title and may be challenged in an action at law. In other words, the action of the land department cannot over-ride the expressed will of congress, or convey away public land in disregard or defiance thereof."

The court therefore held that the patent was void and the plaintiff could not recover.

It follows, therefore, in the case at bar that if the land in controversy was withdrawn up to the date of the selection by the railroad company, and during the whole period of the defendant's settlement, and when the defendant tendered his pre-

emption declaratory statement, neither the occupation of the defendant, nor his filing, made after selection, could operate to defeat the grant.

But it is contended by the defendant that the order of the commissioner of the general land office of November 30, 1880, was void and ineffective to reserve the land from preemption. This was the view taken by the officers of the land department.

Before considering the question of the authority of the commissioner of the general land office to order a withdrawal of indemnity lands for the benefit of the Northern Pacific Railroad Company, it will be proper to consider generally the authority of the land department over the public domain and the authority of its officers to withdraw from the operation of the general land laws of the United States lands otherwise open to acquisition under those laws.

The question was first squarely presented to this court in *Wolcott vs. Des Moines Co.*, 5 Wall. 687. In this case the following facts appeared:

By act of congress, August 8, 1846, there was granted to the then territory of Iowa:

"For the purpose of aiding said territory *to improve the navigation of the Des Moines river from its mouth to Raccoon Fork,* so called, in said territory, one equal moiety in alternate sections, of the public lands, in a strip five miles in width on each side of said river."

It appeared that the Des Moines river flows from the northern boundary of Iowa and empties into the Mississippi river at the southeast corner of the

state, and receives the waters of the Raccoon Fork about the middle of the state.

The extent of the land grant under this act was the subject of continuous conflict of opinion. For a time it was held by the officers of the land department that the grant extended the full length of the Des Moines river in the territory, and then that it extended only to the mouth of the Raccoon Fork. The courts were also divided upon the question until the latter construction was finally placed upon the act by this court in *Railroad Company vs. Litchfield,* 23 Howard, 66.

By the terms of the grant, the lands inuring to the territory were to be selected subject to the approval of the secretary of the treasury and, under the construction of the act that the grant extended above the Raccoon Fork, thousands of acres so situated were patented under the grant and all of the odd numbered sections within five miles of the river above Raccoon Fork were withdrawn. Then came the decision by this court, holding that the grant did not extend above Raccoon Fork.

The validity of the executive order of withdrawal of the odd numbered sections above the Fork was presented in this wise: May 15, 1856, congress passed an act granting to the state of Iowa to aid in the construction of certain specified railroads, every alternate section (designated by odd numbers) for six sections in width on each side of said roads, with the following proviso:

"That any and all lands heretofore reserved to the United States by any act of congress, or *in any*

other manner by competent authority, for the purpose of aiding in any objects of internal improvement, or for any purpose whatsoever, be, and the same is hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands. * * * * *"*

It was contended that this grant to the state for the benefit of the railroads passed title to the lands covered by the executive withdrawal above Raccoon Fork. It was admitted that these lands passed unless excluded by the proviso. The court sustained the validity of the withdrawal, and said:

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory; as we have seen they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the president and cabinet; beside, if this power was not competent, *which we think it was* ever since the establishment of the land department, and which has ben exercised down to the present time, the grant of the 8th of August, 1846, *carried along with it by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated.* Hence immediately upon a grant being made by congress for any of these public purposes to a state, notice is given by the commissioner of the land office to the registers and receivers to stop all sales either public or by private entry. Such notice was given the same day the grant was made in

1856 for the benefit of these railroads. That there was a dispute existing as to the extent of the grant in 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

To the same effect is *Wolsey vs. Chapman,* 101 U. S., 755.

The precise question here presented of a patent issued upon an attempted pre-emption of land covered by an executive withdrawal was considered in *Riley vs. Welles,* 154 U. S., 578.

In that case the same withdrawal as that considered in the two cases last above cited was before the court and it appeared that the defendant had applied to enter the land in controversy under the pre-emption law and that a patent had issued to him. The court held the allowance of the entry and the issuance of the patent to be acts done in violation of law. See also *Wood vs. Beach,* 156 U. S., 359; *Spencer vs. McDougal,* 159 U. S., 62; *Muser-Sauntry, Etc., Co. vs. Northern Pacific Rd. Co.,* 168 U. S., 604.

In the case at bar the decisions of the commissioner of the general land office, and of the secretary of the interior, allowing defendant's entry notwithstanding the withdrawal of the indemnity lands, are based upon the previous decisions of the secretary in the cases of *Northern Pacific Railroad Company vs. Guilford Miller,* 7 Land Decisions 100 and *Jennie L.*

Davis vs. Northern Pacific Railroad Company, 19 Land Decisions 87.

In his decision in the Guilford Miller and Davis cases the secretary questions the general authority of the executive officers of the government to make orders of withdrawal, the decisions of this court on the subject being passed over without mention. This question, however, must be considered as settled.

The secretary finally concludes in these cases that the order withdrawing from the operation of the general land laws lands in the indemnity belt of the Northern Pacific grant was void and without effect to reserve these lands from pre-emption and bases his conclusions on two grounds:

First: That the legislative withdrawal under the provisions of section 6, the act of July 2, 1864, of lands within forty miles of the line of the road, upon filing of the map of general route, was intended by congress to be exclusive of any authority in the land department to withdraw lands in the indemnity belt after definite location.

Second: That section 6 contains in express terms a prohibition against the withdrawal of indemnity lands by executive authority.

IS THE LEGISLATIVE WITHDRAWAL EXCLUSIVE?

The language of the sixth section of the granting act, operating to effect a preliminary withdrawal of all odd numbered sections of land within forty miles of the line of general route, is passed on in *Buttz vs. Northern Pacific Railroad Company,* 119 U S. 55, as follows:

"The sixth section declares that after the general route shall be fixed, the president shall cause the land to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road and that the odd sections granted shall not be liable to sale, entry or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith and information thereof given in the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

And immediately following, in the same opinion, the court declares the purpose of this preliminary legislative withdrawal:

"The object of the law in this particular is plain, it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is by virtue of these provisions, so construed by this court, that the secretary of the interior concludes that it was the intention of congress that no withdrawal of indemnity lands should be ma.le

after the definite location of the road. He says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority and that its action on that behalf is intended to be exhaustive." (19 L. D. p. 89).

The secretary loses sight not only of the particular purposes for which this withdrawal on general route was provided, but of the intent of the whole act as apparent from its liberal terms and also a consideration of the circumstances under which the grant must be adjusted and which congress must have anticipated.

The preliminary withdrawal was for the purpose of securing the company between the time of filing its map of general route and its map of definite location. It was, of course, in contemplation that the general route of the road would be located within a comparatively short time after the passage of the granting act, but that it would require a much longer period to complete the explorations and accurate surveys necessary to a final definite location of the line. This in fact, turned out to be the case, for, although the maps of general route were filed in 1870, 1872 and 1873, the final maps of definite location were not filed until 1884. The preliminary withdrawal of forty miles on each side of the line of general route provided by congress to remain in force up to the time of definite location, was amply sufficient to substantially secure the rights of the company during that period. The line

of the road being only approximately determined by the map of general route, lands in the indemnity belt not then ascertained as such would have a speculative value, at the most, very remote, and the rush of settlers to appropriate these lands, induced by the prospect of a railroad and the consequent development of the country, could not have been looked for until the date of the definite location, when, for the first time, their proximity to the railroad would be assured.

It is submitted that this preliminary legislative withdrawal, instead of evidencing an intention on the part of congress that this exercise of the power of withdrawal should be exclusive, shows a disposition to protect the company in its full rights under the grant. As before stated, the withdrawal on general route was ample to protect the company up to the time of the definite location of its line, when its present grant of lands in place took effect and the limits of its indemnity belt became fixed. When this point was reached the function of the withdrawal on general route was fulfilled and at the same time by the terms of the grant, the right of selection of indemnity arose, the direction of which was expressly committed to the secretary of the interior. It is important to observe that without the withdrawal, the validity of which is here in issue, the right of selection would have been a barren right. By the act of June 2, 1862 (12 Stat. 413), the right of pre-emption was extended to all unsurveyed lands as well as surveyed lands, and, but for the executive withdrawal, the entire indem-

nity belt of the company's grant would have been subject to appropriation for a long period of time during which the company could have made no selection. The right of selection by the terms of the act creating it, was limited to odd numbered sections and until the indemnity lands were surveyed, the odd numbered sections must remain unascertained.

It seems plain that no intention on the part of congress to curtail the powers of the executive in respect to this particular grant, exercised without question in a score of other cases, can be predicated on the provision of section six creating a legislative withdrawal from the location of the general route to the time of definite location. Substantial, and indeed conclusive, evidence of this view is found in the joint resolution of May 31, 1870 (10 Stat. 378), amendatory of and supplemental to the original granting act of July 2, 1864. By the joint resolution of 1870, the company was given the right in any state or territory to select odd numbered sections of land within ten miles beyond the limits prescribed in the act of 1864, in lieu of lands lost from the grant between the date of the act, July 2, 1864, and the date of definite location.

It is inconceivable that congress would create a right of selection by the act of 1864, which we have shown was a barren right, without the usual protection of an executive withdrawal, and six years later, by an act amendatory of the original granting act, give such plain evidence of its intention

that the company should enjoy to the full extent the benefits conferred and intend that its first provision for indemnity should be a nullity.

In construing this grant in *Northern Pacific R. R. Co. vs. St. Paul, Minneapolis & Manitoba R. R. Co.*, 26 Fed. 551-554, Mr. Justice Brewer, sitting at circuit, indicates the rule which must control its construction, that the conditions apparent to congress at the time of its passage must be kept in view. He says:

"While the grant is vast, the line to be constructed in order to earn it, is continental. The grant was made because congress believed the public good required the road, and, in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it is *fairer to presume that congress intended the freest bounty rather than to believe* that it burdened the grant with extra exceptions which when construction became feasible might largely deplete it of value."

Referring again to the case of *Wolcott vs. Des Moines River Co.*, 5 Wall. 687, it will be observed that the court says that the granting act there under consideration, *"carried along with it, by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated."*

A careful examination of the act in question (August 8, 1846, 9 Stat. 77) discloses that the provision referred to by the court was the requirement that the lands granted should be selected by an agent of the territory, "subject to the approval of

the secretary of the treasury of the United States."

Place this provision side by side with the provision of section three of the Northern Pacific granting act, giving the right of indemnity, which is as follows: "Other lands shall be selected by said company in lieu thereof, *under the direction of the secretary of the interior,*" and the conclusion follows that the Northern Pacific grant carried with it not only the power but the duty to reserve the indemnity lands for the benefit of the company.

The proposition laid down by the secretary of the interior where he says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive," meets with a conclusive answer in the case of *Wood vs. Beach,* 156 U. S. 549.

In this case Wood attempted to acquire land as a homestead which was within the indemnity limits of the grant to the Leavenworth, Lawrence & Galveston Railway Company, and also within the like limits of the grant to the Missouri, Kansas & Texas Railway Company. The land had been withdrawn under both grants by departmental orders prior to the settlement of Wood. After citing, with approval, the Des Moines River case, the court say of the withdrawals for the benefit of the railroad companies:

These withdrawals were not merely executive acts, but the latter one, at least, was in obedience

to the direct command of congress. Section 4 of the act granting lands to aid in the construction of what is now known as the Missouri, Kansas & Texas Railway (14 Stat. at Large, 290) is as follows:

"'Sec. 4. And be it further enacted, that as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of the said secretary to withdraw from the market the lands granted by this act in such manner, as may be best calculated to effect the purposes of this act and subserve the public interests'."

The grant for the benefit of the Missouri, Kansas & Texas road was a place grant of the odd numbered sections within ten miles on each side of the line of road with a right of indemnity selection within twenty miles. The withdrawal thus sustained by this court was of indemnity lands.

Section 6 of the grant to the Northern Pacific Railroad Company provides that, after filing the map of general route, "the odd sections of land hereby granted shall not be liable to sale, entry or pre-emption." This is the congressional withdrawal which the secretary of the interior insists must be held to be exclusive of any withdrawal by a subordinate authority.

But in *Wood vs. Beach*, a direction to the secretary to withdraw from market "the lands granted by this act," was held not to exclude his authority to withdraw indemnity lands. If it be contended that indemnity lands are "lands granted," then the land in controversy in this case was withdrawn

by virtue of the provisions of section 6 above noted, but if indemnity lands are not "lands granted," then a statutory withdrawal of granted lands does not exclude the authority of the executive to withdraw indemnity lands.

DOES SECTION SIX PROHIBIT A WITHDRAWAL BY EXECUTIVE ORDER?

As before stated, the secretary places his decision, holding the withdrawal in question void, on two grounds. The first ground alleged has been discussed.

The second ground is that section six of the act of July 2, 1864, contains in express terms a prohibition against withdrawal of indemnity lands by the executive. The language construed to contain this prohibition is that which is printed in italics in the following quotation of section 6:

"Sec. 6. And be it further enacted, That the president of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, *and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby*

extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

It is declared by the secretary, that the provisions extending the pre-emption law and the homestead law to all other lands on the line of said road when surveyed, forbids the executive from withdrawing from the operation of the pre-emption and homestead laws any lands lying in the indemnity limits of the grant as determined by the map of definite location. An examination, however, of the pre-emption law as then in force, and a reading of this particular portion of the granting act in connection with that law, will show almost to a demonstration that the construction contended for is not only unreasonable but impossible. The pre-emption law of September 4, 1841 (5 Stat. 453), in section 10, after declaring the qualifications and conditions for acquiring public lands by pre-emption and extending the operation of the act to all *surveyed* lands, proceeds to define certain classes of land to which the pre-emption right shall not extend, including land reserved for the support of schools, lands included within the corporate limits of towns, lands on which are situated salines or mines, and further in terms as follows:

"No section of land reserved to the United States as alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement."

This exception of sections reserved to the United States alternate to others granted for the construction of canals, railroads or other public improvements, remained in force until March 3, 1853. At that time the following statute was enacted (10 Stat. 244):

"An act to extend pre-emption rights to certain lands therein mentioned.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,

"That the pre-emption laws of the United States as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same, in soldier's bounty land warrants estimated at a dollar and twenty-five cents per acre, or in gold and silver or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction: *Provided,* that no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve such lands prior to the final allotment of the alternate sections to such railroads by the general land office. *And provided further,* that the price to be paid shall in all cases be two dollars and fifty cents per acre or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres; *and provided further,* that any settler who has settled, or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the supreme court of the United States to be invalid, shall be entitled to all the rights of pre-

emption granted by this act and the act of fourth of September, eighteen hundred and forty-one, entitled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights, after the lands shall have been released from reservation in the same manner as if no reservation existed." Approved March 3, 1853.

The effect of this act was to modify materially the restrictive clause in the act of 1841 withholding from the operation of the pre-emption law sections reserved to the United States, alternate to others granted for the construction of railroads and other public improvements. The plain reading of the act of March 3rd, 1853, shows that its effect was to remove the restriction contained in the pre-emption law of 1841, as to sections alternate to railroad lands from the passage of the act up to the time of "final allotment of the alternate sections to such railroads by the general land office." The act was so construed by the rules of the general land office quoted below (1 Lester, p. 509):

"SYNOPSIS OF RULES ADOPTED BY THE GENERAL LAND OFFICE FOR THE RAILROAD DESK.

"First: By the act of 4th September, 1841 (No. 48). 'No sections of land reserved to the United States, alternate to other sections, granted to any of the states, for the construction of any canal, railroad, or other public improvement,' are subject to the operation of said act. But—

"Secondly: The act of 3rd March, 1853 (No. 222), and Act of 27th March, 1854 (No. 234), materially modify the restrictive or interdictive clause

in the Act of 1841. The act of March 3d, 1853, steps in and partly takes off the inhibition contemplated in Act of 1841 by extending the pre-emption laws, at a price of $2.50 per acre, 'over the alternate reserved sections of public lands along the lines of the railroads of the United States,' *where the party had settled and improved the land 'prior* to the *final allotment* of the alternate sections to such railroads, by the General Land Office.'

"Pre-emptions under this Act of 1853, attach within the following periods, to the *United States reserved sections*: 1. Form the date of the 'definite location' of the road (viz., according to the Attorney General's opinion, February 16, 1857),*when the route is surveyed and staked off on the ground*, until the 'final allotment,' by the General Land Office, of the railroad sections, and that is the *date of official list* certifying the latter sections to the State.

"We take the 'definite location' of the route as the period when this Act of 1853,with its $2.50 price applies, for the reason, not only that such seems to be the current of official decisions, but because, up to such 'definite location' there really are no United States alternate sections so set apart, as would be notice, or grounds of inquiry to purchasers. 2. Pre-emption will not attach under this law to the *United States reserved sections*, after the date of 'final allotment,' to the day of offering at public sale, for the reason that the interdicting clause in the Act of 1841, *again applies* to the United States alternate reserved sections aforesaid, the Act of 1853 only taking it off up to the period of final allotment."

It will be observed further, that the act of March 3rd, 1853, although partially removing the restrictions as to alternate sections of railroad grants contained in the pre-emption law, increased the price per acre at which these lands might be acquired during the period contemplated by the act

of 1853, to $2.50 per acre. The right of settlers to acquire lands within the limits of railroad grants alternate to the lands granted for the benefit of railroad companies, was governed by these two acts at the time of the passage of the act of July 2, 1864. Prior to 1853, when the pre-emption law was extended, under the restriction noticed, to these alternate sections, all grants for the construction of railroads, canals and other public improvements, had been made, not to incorporated companies, but to states for the benefit of such companies as might thereafter be incorporated and should comply with the legislation of the respective states controlling the disposition of land granted to them.

Under the practice just indicated and in force in 1853, considerable time would necessarily elapse between the date of the grant to a particular state and the time when the company organized under the legislation of such state would earn the land and the state would become entitled to demand from the general land office that the land in question be certified to it. The grant of July 2, 1864, to the Northern Pacific Railroad Company, was one of the first instances of a departure from the former uniform practice of granting lands for railroads to states instead of directly to railroad companies. The grant to the Northern Pacific being in terms a present grant and its right to the lands enuring upon the definite location of its line, the period contemplated by the act of 1853 during which the restriction contained in the pre-emption law was removed could not arise. The act of 1853

extended the operation of the pre-emption law over the alternate reserved sections up to the time when the granted lands should be finally allotted by the general land office. Under the provisions of the act of July 2, 1864, no period would arise during which the act of March 3rd, 1853, could operate. As indicated by the construction placed by the department on the act of 1853, the alternate reserved sections were open to pre-emption from the time of the definite location of a road to the time of final allotment, it being considered that no sections could be identified as "alternate reserved sections" until the definite location of the line. Under the act of 1864,the company took a present title without "final allotment" by the land office, to its granted sections immediately upon the filing of its map of definite location, and to continue and extend the spirit of the act of 1853, the particular language under consideration was inserted in the grant to the Northern Pacific Railroad Company. Without an extension in terms of the pre-emption and homestead laws to the reserved sections in the place limits of the company's grant, no rights to these lands could be acquired thereunder and, extending the policy which brought about the act of 1853 and which has been followed in every grant since the passage of the act of July 2, 1864, this language was inserted:

Grant to California and Oregon Railroad Company, act of July 25, 1866, section 2 (14 Stat. 239); grant to Atlantic and Pacific Railroad Company, act of July 27, 1866, section 6 (14 Stat. 292); grant

to Stockton and Copperopolis Railroad Company, act of March 2, 1867, section 5 (14 Stat. 548); grant to Oregon Central Railroad Company, act of May 14, 1870, section 2 (16 Stat. 94); grant to Texas and Pacific Railroad Company, act of March 3, 1871, section 12 (16 Stat. 573). In all of these grants by various provisions the pre-emption law was extended to the reserved alternate sections. That the effect of these provisions and of the language in section 6 of the Northern Pacific act was to carry out the spirit of the act of March 3, 1853, and not to forbid a withdrawal of indemnity lands is demonstrated by an examination of the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company (14 Stat. 94). Section 5 of this act is almost word for word the same as section 6 of the Northern Pacific act. But the Placerville and Sacramento grant *contains no indemnity provision* and the only possible purpose for inserting such language was in pursuance of the settled policy to cover the exception in the pre-emption law relating to the reserved sections. And this was the construction placed upon section 6 of the Northern Pacific act before this exception of the pre-emption law was repealed in 1874 by the adoption of the Revised Statutes, and when the executive officers of the government were familiar with the history of legislation. The first interpretation put upon this language is found in a letter of Secretary Usher to the commissioner of the general land office, dated March 9, 1865, transmitting the so-called "Perham Map." This

letter is quoted in the opinion in *Oregon & C. R. Co. v. U. S.* 77 Fed. Rep. 79; 48 U. S. App. 6, and is as follows:

"Department of Interior.
Washington, D. C., March 9th, 1865.

"Sir:—

"Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from market. In view of the provisions of the 3rd and 6th sections of the act of congress, approved July 2, 1864, (Pamphlet Laws, pages 368-369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. *The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of congress.*

"Very respectfully, your ob't. servant,
"J. P. USHER, Secretary.

"The Commissioner of the General Land Office."

The concluding sentence of this letter shows that in 1865 the provisions of section 6 were understood to refer to the even numbered reserved sections. Moreover, the conclusion of the secretary that section 6 in terms extends the homestead and pre-emption laws to lands in the indemnity limits and forbids their withdrawal is reached without a consideration of the acts of 1841 and 1853 here dis-

cussed, and furthermore without giving effect to the words "when surveyed," which occur near the close of the section.

By the terms of the act the pre-emption and homestead laws are only extended to "all other lands on the line of said road" *when surveyed,* and this language must be read in connection with the first provision of the section, to-wit:

"The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road."

This restriction that the pre-emption and homestead laws should not extend to the alternate reserved sections until surveyed is in full accord with the policy of the act of 1853, for in 1853 unsurveyed lands were not subject to pre-emption.

Furthermore, it is important to observe that, by the passage of the act of June 2, 1862 (12 Stat. 413), two years before the passage of the Northern Pacific granting act, the right of pre-emption was extended to all lands belonging to the United States to which the Indian title had been or should be extinguished "under the conditions, restrictions and stipulations" contained in the pre-emption law of 1841. By this it will be seen that under the construction of section 6, act of July 2, 1864, contended for by the secretary of the interior, congress must be held to have enacted that the pre-emption and homestead laws should be extended to the unsurveyed lands situated in the indemnity belt of the grant to the company *when surveyed,* although

two years earlier the same laws had been extended to these same lands.

THE DECISION OF THE SECRETARY IS CONTRARY TO THE SETTLED CONSTRUCTION OF THE ACT.

For nearly twenty years, the construction placed by the Interior Department upon the Northern Pacific grant was uniform and sustained the power of withdrawal of indemnity lands. Between 1871 and 1887 more than forty withdrawals of indemnity lands were made and the authority to make such withdrawals remained unquestioned until the decision by the secretary in the Guilford Miller case in 1888. The reports of land decisions by the secretary previous to 1888 are filled with cases in which the validity of these withdrawals was sustained. In the case of Prest vs. Northern Pacific Railroad Company 2 Land Decisions, 506 and in the letter of instructions of Secretary Teller, dated May 17, 1883, 2 Land Decisions 511, the question is considered at length and the power of withdrawal sustained. This construction prevailed during the terms of Secretaries Usher, Browne, Cox, Delano, Kirkwood and Teller.

In *United States vs. Pugh* 99 U. S. 269, this court said: "It is a familiar principle of interpretation that in a case of doubtful and ambiguous law, the contemporaneous construction of those who have

been called upon to carry it with effect is entitled to great respect."

In *United States vs. Moore*, 95 U. S. 763, this court gave one of the reasons for this rule: "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

The construction of the executive officers, to which the courts give weight, is the *contemporaneous* and continued construction. Every intendment is in favor of the correctness of the practical construction with which Secretary Vilas was confronted when he announced the doctrine of the Guilford Miller case, but his own decision in that case over-ruling the long settled construction must rest solely upon his argument which we have undertaken to show ignores important and indeed controlling considerations and leads to a conclusion which is incorrect.

The conclusion that the contemporaneous construction of the interior department is correct and that the power of withdrawal existed, is sustained by the supreme court of North Dakota in *Hewitt v. Schultz*, (No. 241 on the present calendar), heard in argument with the case at bar, and by *Thompson v. St. P. M. & M. Ry. Co.*, 83 Fed. Rep. 546; *Southern Pacific R. R. Co. v. Wiggs*, 43 Fed. Rep. 333, and *Southern Pacific R. R. Co. v. Groeck*, 87 Fed. Rep. 970.

In the last case above cited, decided by the cir-

cuit court of appeals for the ninth circuit, the court construed section 6 of the grant by act of congress of July 27, 1866, (14 Stat. 292). Section 6 of this act is identical with section 6 of the Northern Pacific act. The court held, not only that section 6 did not forbid a withdrawal of indemnity lands, but constituted a statutory withdrawal after definite location.

THE SELECTION.

The complaint alleges that the railroad company selected the land in controversy by filing a selection list in the proper land office, prepared in accordance with the rules and regulations of the interior department; that this list was filed on December 12, 1883, and was accepted and approved by the district land officers on December 17, 1883, and all the fees required by law were paid at the time of this selection.

It is alleged further that on October 26, 1887, complying with certain other instructions of the interior department, issued subsequent to the selection, the railroad company filed a certain list designating the losses in lieu of which the land in controversy had been selected, and thereafter in 1892 and 1893, in compliance with certain other and further instructions, rearranged the losses specified in 1887, tract for tract, with the lands selected, and that by such rearrangement the lands in controversy were selected in lieu of an equal quan-

tity of lands situated within the forty mile or primary limits of the grant within the state of Washington and at the date of the definite location included within a reservation set apart for the Yakima Indians.

The allegation of the complaint is categorical that the selection was made in compliance with the rules and regulations of the secretary of the interior. No tract of lost land was specified as a basis for the selection until 1887, for by the express instructions of Secretary Teller, issued May 28, 1883, the duty of specifying the basis for selections was properly committed to the commissioner of the general land office (12 Land Decisions 196).

It was urged by the defendant in the court below that, conceding the land department to have rendered an erroneous decision upon the questions already discussed, yet the plaintiff is remediless for the reason that the land department has never approved the railroad company's selection. This argument is based upon the ground that it is committed to the secretary of the interior exclusively to determine whether a given tract of land in the indemnity limits of the grant is subject to selection and whether an equal quantity of land has been lost from the primary limits for which indemnity may be taken.

It is undoubtedly true that in the first instance these questions are committed to the secretary of the interior, and in so far as their determination depends upon matters of fact, his conclusions are final. But it does not follow when that officer can-

cels a selection under an erroneous view of the law and fails to pass upon the question of the status of the land selected or upon the question of lands being lost from the primary limits for which indemnity may be taken, that this failure will defeat the grant.

In *St. Paul & Sioux City Ry. Co. v. Winona & St. Peter Rd. Co.*, 112 U. S. 720, it appeared that certain lands were situated within the indemnity limits of two grants, one made to the state of Minnesota for the benefit of the St. Paul & Sioux City Company, and one for the benefit of the Winona & St. Peter Company.

The grants were made by acts of congress of the same date, and it appeared that the St. Paul & Sioux City Company had made the earlier location of its line. Upon these grounds the interior department held that the right of that company to lands within its indemnity limits was superior, and although the Winona Company selected the lands first, the lands were certified to the state of Minnesota for the benefit of the St. Paul Company.

This court, speaking of the right of selection, said:

"Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land.

"In this case, and for these reasons, priority of selection secures priority of right. * * *

"It is no answer to this to say that the secretary

of the interior certified these lands to the state for the use of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for *lieu* lands or for the extended grant of 1864, out of any odd sections within twenty miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the Winona Company of rights which became vested by its selection of those lands. *Johnson v. Towsley*, 13 Wall. 72, 80; *Gibson v. Chouteau*, 13 Wall. 92, 102; *Shepley v. Cowen*, 91 U. S. 330, 340; *Moore v. Robbins*, 96 U. S. 530, 536."

It is apparent in this case that there was no finding by the secretary of the interior that at the date of selection of the lands in question by the Winona Company, they were of the class of lands subject to selection, or that an equal quantity of lands had been excepted from the place limits of the grant for which indemnity might be taken, for the selection of the Winona Company was canceled upon the ground of the earlier location of the St. Paul Company.

That the courts will not permit a grant to be defeated by the failure of the secretary of the interior to pass upon questions of fact necessary to the approval of an indemnity selection, is further illustrated by the case of *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1. In that case the Northern Pacific Company filed a bill to hold the St. Paul & Pacific Company trustee of the legal title of certain lands situated within the indemnity limits of its grant

which had been certified to the state of Minnesota, and deeded by the state of Minnesota to the St. Paul & Pacific Company, upon the ground that the certification to the state was made under an erroneous construction of the two grants under which the secretary of the interior held that the grant to the state of Minnesota for the benefit of the St. Paul & Pacific Company was prior to the grant to the Northern Pacific Company. This court held that the grant to the Northern Pacific Company was prior in time and that the lands in question were withdrawn for the benefit of the Northern Pacific Company and that the secretary of the interior committed an error of law in certifying the lands to the state of Minnesota. It was objected, however, by the St. Paul & Pacific Company that the Northern Pacific Company was not in privity with the United States and could not complain of the certification to the state, for the reason that the lands in question had never been selected by the Northern Pacific Company. In this connection the court said:

"As to the objection that no evidence was produced of any selection by the secretary of the interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the secretary in selecting from them, for they were all appropriated."

The selections never having been made, it is apparent that the court assumed the duty of passing

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upon the character of the lands, and the question of the deficiency in the indemnity limits, and an examination of the record in that case will show that the fact of the deficiency was not established by a finding of the interior department, but by evidence based upon an examination of the public records.

And the reason for the rule that where the secretary of the interior fails to find the facts necessary to the approval of an indemnity selection, and patents are issued to other parties without a finding of such facts, the courts will perform the duty originally committed to the secretary, is found in the decisions of this court in cases involving lands claimed under the swamp land grants to the various states.

By these grants the states took all those legal subdivisions of lands, the major portion of which was so wet and swampy as to be unfit for cultivation. By the terms of the grants it was made the duty of the secretary of the interior to ascertain the character of the land, and upon identification in this manner, to furnish lists of the lands so determined to be swamp, to the states. And this court has uniformly held that where the secretary neglects or refuses to pass upon the question of the character of the lands the matter may be examined by the courts.

In *Hannibal & St. Joe. R. R. Co. v. Smith*, 9 Wall. 95, the question was presented. In this case the railroad company claimed under a grant from which lands theretofore granted were, of course,

excepted, and brought an action to recover a tract of land from one Smith, who claimed the land as swamp land granted by the United States to the state of Missouri, and conveyed by the state to him. It was admitted that if the land did not pass to the state by the swamp land grant, it passed to the railroad company. The secretary of the interior had failed to pass upon the question of the character of the land and the court below allowed the grantee of the state to show by parol evidence that the land was swamp in fact. This court said:

"By the second section of the act of 1850 it was made the duty of the secretary of the interior to ascertain this fact and furnish the state with evidence of it. Must the state lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the state did not depend on his action, but on the act of congress, and though the state might be embarrassed in the assertion of this right by the delay or failure of the secretary of the interior to ascertain and make out lists of these lands, the right of the state to them could not be defeated by that delay. * * *

"The matter to be shown is one of observation and examination, and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.

"Any other rule results in this, that because the secretary of the interior has failed to discharge his duty in certifying these lands to the state, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they are of the class excluded from the plaintiff's grant."

In *French v. Fyan*, 93 U. S. 169, commenting on *Hannibal & St. Joe Railroad Company v. Smith*, *supra*, and the admission of parol testimony in that case for the purpose of identifying the land as falling within the grant, the court said:

"The admission was placed expressly on the ground that the secretary of the interior had neglected or refused to do his duty; that he had made no selections or lists whatsoever, and would issue no patents, although many years had elapsed since the passage of the act. * * *

"There was no means, as this court has decided, to compel him to act; and if the party claiming under the statute in that case could not be permitted to prove that the land which the state had conveyed to him as swamp land, was in fact such, a total failure of justice would occur, and the entire grant of the state might be defeated by this neglect or refusal to do his duty."

See also *Wright v. Roseberry*, 121 U. S. 488, where the cases on this subject are reviewed and the foregoing propositions are affirmed.

As said by the court in the case of *St. Paul & Sioux City R. R. Co. v. Winona & St. Peter R. R. Co.*, *supra*, the arbitrary refusal of the secretary cannot defeat the right which the court declared to be a vested right acquired by a selection of land properly subject to selection, when made in accordance with the statute.

It is submitted that the judgment of the Supreme Court of Washington should be reversed.

C. W. BUNN and
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Br. of Ettinger & O. C.
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IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

In Error from the Supreme Court of the State of Washington.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD DEANE, F. S. BELL, IVAN CHASE, JOHN K. MCCORNACK, ANN J. CLYDE, J. R. MALHERN, SPOKANE & PALOUSE RAILWAY COMPANY (a Corporation), SPOKANE & PALOUSE LAND COMPANY (a Corporation), PALOUSE MILL COMPANY (a Corporation), and A. F. PUGH,

Plaintiffs in Error,

vs.

JACOB SLAGHT,

Defendant in Error.

Brief of Defendant in Error.

U. L. ETTINGER,
CHARLES M. WYMAN,
AND THOMAS NEILL,

Attorneys for Defendant in Error, Colfax, Washington.

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—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

In Error from the Supreme Court of the State of Washington.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD DEANE, F. S. BELL, IVAN CHASE, JOHN K. MCCORNACK, ANN I. CLYDE, J. R. MALHERN, SPOKANE & PALOUSE RAILWAY COMPANY (a Corporation), SPOKANE & PALOUSE LAND COMPANY (a Corporation), PALOUSE MILL COMPANY (a Corporation), and A. F. PUGH,

Plaintiffs in Error,

vs.

JACOB SLAGHT,

Defendant in Error.

Brief of Defendant in Error.

U. L. ETTINGER,
CHARLES M. WYMAN,
AND THOMAS NEILL,

Attorneys for Appellee.
Colfax, Washington.

STATEMENT OF CASE.

The title of the plaintiff in error is deraigned from the N. P. R. R. Co. The title of the N. P. R. R. Co. is based upon the provisions of its grant from the government by act of congress dated July 2, 1864. Section 3 of that act is as follows:

"Sec. 3. And be it further enacted, That there be, and hereby is, granted to the Northern Pacific Railroad Company its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-

emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided, further, That all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd

numbered sections, nearest to the line of said road may be selected as above provided: And provided, further, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: And provided, further, That no money shall be drawn from the Treasury of the United States to aid in the construction of said 'Northern Pacific Railroad.'"

Section 6 is as follows:

"Sec. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; (b) and the add sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided by this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights and the acts amendatory thereof, and of the act entitled, 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alter-

native sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale (c)".

The facts are almost identically those involved in N. P. R. R. Co., vs. Miller, a land office decision reported in 7 L. D. page 105, from which case the following statement of the action taken by the railroad company under the terms of its charter and of the department in pursuance thereof, is taken, it being unpracticable for the defendant in error, to refer to the original records of the department.

On March 6, 1865, the President of the Company filed with the Secretary of the Interior, a map, indicating the general route of the road, and at the same time asked that a withdrawal of the lands granted to the company as designated by the map be withdrawn from settlement and sale.

This is commonly known as the Perham map of general route.

On March 9, 1865, the Secretary of the Interior transmitted this map to the Commissioner of the Land Department, stating that he thought that the odd numbered sections as shown by the Perham map ought to withdraw to a distance of ten miles on each side of the road in the states (Minnesota and Wisconsin) and twenty miles on each side

of the road in the territories through which the line of road passed, unless the Commissioner should perceive some objection thereto.

Objections were thereafter made by the Commissioner and no action was taken by the department in pursuance of the request for and suggestion by the Secretary of a withdrawal of the lands described in the Perham map.

N. P. R. R. Co. vs. Miller, 7 L. D. 103-4.

On July 30, 1870, two maps of general route were filed by the Northern Pacific Railroad Company in the department, the first covering that portion of the proposed line from Lake Superior to a point on the right bank of the Columbia river, opposite the mouth of the Walla Walla river in the then Territory of Washington, and the second from the point last above located westward to the Coast.

On August 13, 1870, the Secretary transmitted the maps to the Commissioner as showing the designated route of the Northern Pacific Railroad Company, and then and within a few days thereafter, directed a withdrawal of all the lands embraced within its limits within the Territory of Washington as designated by said maps.

N. P. R. R. Co. vs. Miller, 7 L. D. pages 104-5.

The lands in controversy were not within either the place or indemnity limits of this withdrawal. "The line of

general route so established, entered the Territory (of Washington) near the southeast corner thereof at a point about ten miles north of the Oregon line, and thence nearly due west to the junction of the Walla Walla and Columbia rivers." (N. P. R. R. Co. vs. Miller, 7 L. D. 105.)

On February 21, 1872, the company filed another and what is now styled an "Amended map" of general route of the road, and a withdrawal was ordered by the Secretary of the lands within its place limits.

"The new line * * * entered the Territory at a point about 108 miles north of the point at which the line designated by the map of 1870, crossed the eastern boundary, and thence ran in a southwesterly direction to the mouth of the Walla Walla river, where it joined the line of 1870. (N. P. R. R. Co. vs. Miller, 7 L. D. 106.)

This map of general route and order of withdrawal (of 1872) included within its place limits the lands in controversy.

On October 4, 1880, the company filed its map of definite location, and thereupon the Secretary withdrew the lands within its place and *indemnity* limits. The lands in controversy were without the place but within the indemnity limits of the road as thus definitely located. This order of withdrawal, so far as it affected lands within the indem-

nity limits of the map if definite location was revoked by the secretary of the interior on August 15, 1887. (Vol. 6. L. D. 92-3.)

On December 15, 1883, the N. P. R. R. Co., selected the lands in controversy as indemnity in lieu lands lost within its place limits. This was a bulk selection and was not approved by the Secretary of the Interior, for reasons set forth in N. P. R. R. Co., vs. Miller, 7. L. D. 123-124.

On October 25, 1887, it again selected these lands as indemnity losses alleged to have been suffered in its place limits. This selection was not approved by the Secretary for reasons stated in N. P. R. R. Co., vs. Miller 7 L. D. 124.

Prior to either of these selections and on March 1st, 1883, the respondent settled upon the lands with the bona fide intention of filing thereon as a homestead, and on October 31, 1887, presented his application to file thereon. Findings Commissioner Transcript p. 8. On August 4th, 1887, the N. P. R. R. Co., conveyed to Powers the land in controversy. Transcript p. 9.

Upon due notice of the application of the respondent to enter the lands, the N. P. R. R. Co., appeared in the district

land office in which said application was pending and made its written objections to the allowance of the entry and thereafter Powers intervened and asserted his rights. Transcript p. 8.

It nowhere appears what the showing by either of the parties was before the district office: except in the opinion of the Commissioner, and his opinion does not purport to contain more than a resume of what he deemed the salient points. The local land office decided adversely to the N. P. R. R. Co., and adversely to the defendant in error, Jacob Slaght herein, and in favor of Powers, who then by virtue of the conveyance above alluded to, possessed all the title which the company had. The N. P. R. R. Co., and the defendant in error, Jacob Slaght, appealed to the Commissioner of the general land office who reversed the holding of the district land office, and decided in favor of the defendant in error, Jacob Slaght, and against the N. P. R. R. Co., and Powers. Transcript p. 8-9-10.

The N. P. R. R. Co., which had parted with its title, if any, to the lands, did, and Powers, its successor in interest, did not appeal to the Secretary of the Interior. Transcript p. 10-11. The Secretary sustained the holding of the Commissioner, but on what findings of fact or conclusions of

law, does not appear. Transcript p. 10. Subsequently in 1892 and 1893, the N. P. R. R. Co., selected these lands in lieu of lands lost in Yakima Reservation. (Transcript p. 6.) These lands were not surveyed at the time of the former selections, nor was the line of road through the Yakima Indian Reservation then definitely located and of course until definite location, no claim for indemnity could be sustained. N. P. R. R. Co., vs. Miller, 7 L. D. 124-5. A patent to the lands upon final proof was issued to respondent in 1897. (Transcript p. 10-11.) Prior to the commencement of this action Powers conveyed portions of the land to his co defendants. (Transcript p. 11.)

It is also pleaded that the lands in the indemnity limits were insufficient to satisfy losses in the place limits of the road. (Transcript p. 4-5.) It is not pleaded, however, that such fact has been entertained or found by the Secretary, or that any of the selections were approved by him. Some of the facts hereinbefore stated do not appear in the complaint, but do appear in the cases cited by the Commissioner in his judgment as set forth in the complaint and cases there cited. Inasmuch as they clearly form the basis of his opinion, it will be contended that they (the facts upon which the Commissioners' decision was based)

should have been pleaded, and that this court must either adopt them by such reference or sustain the demurrer as a matter of practice.

Subsequently, the plaintiff in error filed its complaint in the Superior Court of Whitman County, Washington, which complaint was thereafter twice amended, and finally a judgment in favor of the defendant in error here, was entered in that court upon a demurrer to the second amended complaint. From this judgment an appeal was taken to the Supreme Court of the State of Washington, where the judgment of the lower court was affirmed.

The case of Powers vs. Slaght (20 Washington, 712) was argued with and at the same time as was Moore vs. Cormode (20 Washington, 503), with which the facts are identical, except in respect to point One hereinafter submitted, which we believe was not involved in that case.

POINTS AND AUTHORITIES.

I.

THE PLAINTIFFS IN ERROR ARE ESTOPPED BY REASON OF POWER'S FAILURE TO APPEAL FROM COMMISSIONER'S DECISION.

High on Jnjunctions, Vol. I, 173.
Manning v Hunt, 36 Tex. 118.
Savoise v Theodaux, 29 La, Ann. 51.
Palmer v Gardner, 77 Ill. 143.
Schwab v City of Madison, 49 Ind. 329.
Naughton v Drinkgrave, 25 La. Ann. 538.
Crim v Handley, 94 U. S. 652.
Hendrickson v Hinckley, 17 How. 443.
Ard. v Brandon, 156 U. S. 537.

II.

THE SUIT OF THE PLAINTIFFS IN ERROR WAS BARRED BY THE STATUTE OF LIMITATIONS.

N. P. R. Co. v Colburn, 164 U. S. 385.
St. Paul & Pac. R. Co. v N. P. R. Co. 138 U. S. 1.
Deseret Salt Co. v Tarpey, 142 U. S. 241.
2 Ballinger's Code (Wash.) Secs. 4797-4907.

III.

THE COMPLAINT IS INSUFFICIENT UNDER THE RULE OF LOCAL PRACTICE.

19 L. D. 87.
17 L. D. 8.
Moore v Cormode, 20 Wash. 305,
Durango Land Co. v Evans, 80 Fed. 425.
Johnson v Drew, 171 U. S. 93.
Lee v Johnson, 116 U. S. 48.
Quimby v Conlan, 104 U. S. 420.
Marquez v Frisbie, 101 U. S. 473.
Vance v Burbank, 101 U. S. 514.
Moore v Robbins, 96 U. S. 530.
Shepley v Cowan, 91 U. S. 330.
Johnson v Towsley, 13 Wal. 72.
Sanford v Sanford, 139 U. S. 642.
Barden v N. P. R. Co. 154 U. S. 288.
Wis. R. Co. v Price Co. 133 U. S. 496-511.
Wis. R. Co. v Forsythe, 159 U. S. 558.
U. S. v. M. K. & T. R. Co. 141 U. S. 358.
U. S. v Colton Co. 146 U. S. 615.
Elling v Trexton, 7 Mon. 330.
Grandin v LaBar, 57 N. W. 243.
Reser v Carney, 54 N. W. 89.
N. P. R. Co. v Miller, 7 L. D. 100.
Grunewald v N. P. R. Co. 24 L. D. 195.
In re N. P. R. Co. 25 L. D. 511.
Jackson v Lamour Co. 46 N. W. 449.

IV.

THE LANDS EMBRACED WITHIN THE TERMS OF SECTION 6 OF THE GRANT ARE WITHDRAWN PER FORCE OF THE STATUTE. THE LANDS IN CONTROVERSY WERE NOT WITHIN THE FORTY MILE STRIP AND WERE NOT THEREFORE WITHDRAWN BY THE TERMS OF THE STATUTE.

U. S. v Or. & Cal. R. Co. 20 Sup. Ct. Rep. 26.
U. S. v M. K. & T. R. Co. 141 U. S. 358.
K. P. R. Co. v Atchinson R. Co. 112 U. S. 414.
Wis. R. Co. v Price Co. 113 U. S. 496.
Buttz v N. P. R. Co. 119 U. S. 55.
St. Paul & Pac. R. Co. v N. P. R. Co. 139 U. S. 1.
U. S. v S. P. R. Co. 146 U. S. 570.
N. P. R. Co. v Musser Sauntry Co. 168 U. S. 604.
Burfenning v Chicago R. Co. 163 U. S. 321.
N. P. R. Co. v Miller, 7 L. D. 104-5-6.
U. S. v Or. & Cal. R. Co. 20 Sup. Ct. Rep. 269.
U. S. v Moore, 95 U. S. 760.
In re Al. & Pac. R. Co. 6 L. D. 77 et seq.
N. P. R. Co. v Cole, 17 L. D. 8.
In re Fla. & Pen. R. Co. 15 L. D. 529.
M. K. &. T. Co. v Trexler, 17 L. D. 122.
N. P. R. Co. v Lillethun, 21 L. D. 487.
N. P. R. Co. v Davis, 19 L. D. 87.
S. P. R. Co. v Kanawyer, 23 L. D. 500.
Grunewald v N. P. R. Co. 24 L. D. 195.
N. P. R. Co. v St. P. & M. M. Co. 25 L. D. 67.
N. P. R. Co. v Streib, 26 L. D. 589.
Stuart v S. P. R. Co. 22 L. D. 61.
Elling v Thexton, (Mont. 330) 16 Pac. 931.
Grandin v LaBar, (N. Dak.) 57 N. W. 243.
Moore v Cormode, 20 Wash. 305,
Van Wyck v Klevano, 106 U. S. 366.

V.

THE ORDER OF THE DEPARTMENT DIRECTING THE WITHDRAWAL OF LANDS BEYOND THE FORTY MILE STRIP CONVEYED NO INTEREST IN THE LANDS TO THE COMPANY AND WAS REVOCABLE.

6 L. D. 77 to 93.
Woods v Beach, 156 U. S. 548.
Riley v Welles, 76 U. S. 246.
Wolcott v Des Moines R. Co. 72 U. S. 681.
Burfenning v R. Co. 163 U. S. 321.
Woolsey v Chapman, 101 U. S. 755.
2 L. D. 516.
In re S. P. R. Co. 18 L. D. 315.
S. P. R. Co. v McWharter, 14 L. D. 612.
S. P. R. Co. v Meyer, 9 L. D. 250.
N. P. R. Co. v Miller, 7 L. D. 100.
U. S. v Moore, 95 U. S. 760.
N. P. R. Co v Miller, 7 L. D. 124-5.
Knight v United Land Asso 142 U. S. 161.
Bishop of Nesqually v Gibbon, 158 U. S. 155.

VI.

THE ALLEGED SELECTIONS, PRECEEDING THE ENTRY WERE NOT APPROVED BY THE SECRETARY OF THE INTERIOR AND WERE INSUFFICIENT TO DEFEAT THE ENTRY OF THE DEFENDANT IN ERROR.

Lee v Johnson, 116 U. S. 48.
Johnson v Towsley, 13 Wal. 72.
Shepley v Cowan, 91 U. S. 330.
Moore v Robbins, 96 U. S. 530.

Marquez v Frisbie, 101 U. S. 473.
Vance v Burbank, 101 U. S. 514.
Sanford v Sanford, 139 U. S. 642.
N. P. R. Co. v Colburn, 164 U. S. 383.
Miller v N. P. R. Co. 7 L. D. 123-4-5.
In re N. P. R. Co. 25 L. D. 512.
N. P. R. Co. v Sanders, 166 U. S. 620.
N. P. R. Co. v Logging Co. 168 U. S. 605.
N. P. R. Co. v DeLacey, 174 U. S. 622.
In re At. & Pac. 8 L. D. 373.
N. P. R. Co. v John O. Miller, 11 L. D. 1-428.
In re S. M. R. Ex. Co. 12 L. D. 518.
In re F. C. & P. R. Co. 15 L. D. 529.
Wood v Burlington R. Co. 104 U. S. 329.
Wiley v N. P. R. Co. 22 L. D. 606.
LaBar v N. P. R. Co. 17 L. D. 406.
N. P. R. Co. v Lynch, 22 L. D. 609.
S. P. R. Co. v McKinley, 22 L. D. 493.
State of Wash. v N. P. R. Co. 22 L. D. 482.
N. P. R. Co. v Holtz, 22 L. D. 309.
U. S. v M. K. R. Co. 141 U. S. 358.
St. P. R. Co. v Winona R. Co. 112 U. S. 720.
Sioux City R. Co. v Chicago R. Co. 117 U. S. 405.
Cedar Rapids R. Co. v Herring, 110 U. S. 27.
M. K. &. T. Co. v K. P. & R. Co. 97 U. S. 491.
Wis. R. Co. v Price Co. 133 U. S. 496.
Wis. R. Co. v Forsythe, 159 U. S. 46.
U. S. v Colton Co. 146 U. S. 615.
Ryan v R. R. Co. 99 U. S. 382.
Grunewald v N. P. R. Co. 24 L. D. 195.

ARGUMENT.

I.

THE PLAINTIFFS IN ERROR ARE ESTOPPED BY REASON OF POWER'S FAILURE TO APPEAL FROM THE COMMISSIONER'S DECISION.

It appears from the case, as made and set forth in the pleadings, that at the time of the hearing in the District land office in the matter then pending between the defendant in error and the Northern Pacific Railroad Company, that the plaintiff in error, William L. Powers, who is the grantor of this plaintiff herein, was vested with all the title and interest which he now has in the lands involved in this suit. That he intervened in that matter and set up his rights there. That the case was decided against him by the Commissioner and that he did not appeal.

For such errors as were committed by the Commissioner he had provided for him, an adequate remedy, according to the rules and regulations of the department, and the law, by appeal to the Secretary of the Interior.

It is a rule of almost universal adoption, that where an error has been committed by an inferior court, or tribunal and the party injured has an adequate remedy by appeal, that in the absence of fraud or mistake, neither of which are pleaded in this case, equity will not afford him relief, who has neglected or refused to seek it in the forum, constituted expressly for the purpose of correcting such error.

High on Injunctions, Vol. 1, 173.
Manning v Hunt, 36 Tex. 118.
Savoise v Theodaux, 29 La. Ann. 51.
Palmer v Gardner, 77 Ill. 143.
Schwab v City of Madison, 49 Ind. 329.
Naughton v Drinkgrave, 25 La. Ann. 538.
Crim v Handley, 94 U. S. 652.
Hendrickson v Hinckley, 17 How. 443.

In this case the Northern Pacific Railroad Company which had no interest to protect (for there is no evidence or allegation that its deed to Powers was other than a quit claim) appealed from the Commissioner's decision but does not sue, but Powers who held the entire title, did not appeal but does sue. To permit him to have relief here, which he might have obtained by appeal to the Secretary would be contrary to the rule.

The case of Ard vs. Brandon, 156 U. S. 537, is not to the contrary, but clearly recognizes the application of the

rule to proceedings in the land office. The failure to appeal there, being due to a mistake caused by the reliance of the party upon misleading information furnished him by the department, an exception was made because of equities. No reason or excuse is pleaded or shown in this case to forbid the application of the rule.

II.

THE SUIT OF THE PLAINTIFF IN ERROR WAS BARRED BY THE STATUTE OF LIMITATIONS.

It has been held by this court that the grant to the N. P. R. Co., operated to pass the fee to the lands in the grant to the company, upon the date of the filing of the map of definite location in the place limits and upon selection in the indemnity limits.

> N. P. R. C. v Colburn, 164 U. S. 385.
> St. P. & Pac. R. Co. v N. P. R. Co. 138 U. S. 1.
> Deseret Salt Co. v Tarpey, 142 U. S. 241.

Actions for the recovery of real estate are barred in this state after ten years.

> 2 Ballinger's Code (Wash.) Sec. 4797.

The statute was properly pleaded by demurrer in this case.

Transcript, p. 14.
2 Ballinger's Code, Sec. 4907.

The possession, continuous and adverse of the defendant in error, is not disputed, from the date of his filing in 1887.

If as contended by the plaintiff in error, title, the fee, passed to the company, to the lands, by the selection of December 17, 1883, or of October, 1887, independent of a patent, as held in the N. P. Co. vs. Colburn, supra, then suit was instituted too late, the statute barred recovery and the demurrer was properly sustained.

III.

THE COMPLAINT IS INSUFFICIENT UNDER THE RULE OF LOCAL PRACTICE.

The decision of the commissioner was based upon facts which appeared, probably in the findings of the District Land Office, and presumably in the testimony, but which were not stated in his opinion as pleaded, nor in the allegations of the complaint.

This appears from his opinion set forth in the complaint, wherein without findings of the fact to base it upon, the commissioner says: "These withdrawals have been

held by the department to be without authority of law and no effect;" (17 L. D. 8 and 19 L. D. 87)," thereby adopting the facts appearing in cases cited.

An examination of the land decisions cited by the commissioner will show that the facts upon which he based his opinion that the withdrawals referred to were invalid, are not pleaded.

Under such circumstances, because it affirmatively appears in the complaint that the facts upon which the alleged error is based, are not pleaded, it has been very generally held that the complaint is insufficient upon the ground amongst others of the presumption in favor of the judgment sought to be reviewed, and the patent sought to be annuled.

Moore v Cormode, 20 Wash. 305.
Durango Land Co. v Evans, 80 Fed. 425.
Johnson v Drew, 171 U. S. 93.
Lee v Johnson, 116 U. S. 48.
Quimby v Conlan, 104 U. S. 420.
Marquez v Frisbie, 101 U. S. 473.
Vance v Burbank, 101 U. S. 514.
Moore v Robbins, 96 U. S. 530.
Shepley v Cowan, 91 U. S. 330.
Johnson v Towsley, 13 Wal. 72.
Sanford v Sanford, 139 U. S. 642.

The plaintiffs in error's title depends upon the selection of the lands in controversy in lieu of lands lost by the N.

P. R. R. Company in the main limits of its grant. The allegations in reference to the alleged selections, appear in par. VIII, transcript p. 5-6, and are clearly insufficient, in that it does not appear that the attempted selections were approved by the Secretary of the Interior. The allegations are almost identical in form and substance with those held to be insufficient by his court in Barden vs. N. P. R. R. Co. 154U. S. 288. "Nor can such approval be inferred from his not formally rejecting them." "The approval of the Secretary was essential to the efficacy of the selections and to give the company any title to the lands selected. His action in the matter was not ministerial but judicial. He was required to determine in the first place whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands."

Wis. R. Co. v Price Co. 133 U. S. 496-511.
Wis. R. Co. v Forsythe, 159 U. S. 46.
U. S. v M. K. & T. R. Co. 141 U. S. 358.
U. S. v Colton Co. 146 U. S. 615.
Elling v Trexton, 7 Mon. 330.
Grandin v LaBar, 57 N. W. 243.
Moore v Cormode, 20 Wash 305.

If "the approval of the Secretary was essential to the efficacy of the selections" the failure to plead such approval rendered the complaint subject to demurrer, and the holding of the trial court sustaining the demurrer was clearly

correct as a matter of practice whether the selections were approved as a matter of fact or not.

If facts existed which would in equity except this case from the rule requiring an allegation of the approval of such selections by the Secretary, then upon elementary principles, such facts should have been pleaded. They are not pleaded, but on the contrary one would infer from the allegations of the complaint that the pleader supposed the approval of the local officers (the register and receiver) to be sufficient.

As a matter of fact, the Secretary rejected both of the alleged selections of date prior to the defendant in error's entry, amongst other reasons, because the tract in lieu of which the selections were made constituted a part of the Yakima reservation across which the line of the road had not until long after either selection, been definately located, so that it might be that, upon definite location of such portion of the road, there would be no losses.

N. P. R. Co. v Davis, 19 L. D. 87.
N. P. R. Co. v Cole, 17 L. D. 8.
N. P. R. Co. v Miller, 7 L. D. 100.
Grunewald v N. P. R. Co. 24 L. D. 195.
In re N. P R. Co. 25 L D. 511

It would seem clear from the frequent decisions of this court that no right to indemnity could exist prior to de-

finite location of that portion of the road in lieu of lands lost in which, indemnity is sought. If this be true, then the action of the department in refusing to allow the selections was correct. The consideration of this point is however not necessary to the proper determination of the point involved. The State Court held the complaint insufficient because it did not conform to local rules of practice in that it was not pleaded that the selections were approved nor were facts sufficient pleaded, to except the case from the rule requiring such allegation.

Cormode v Moore, 20 Wash. 305.

In these matters governing the course of local practice and pleading, it is submitted that error does not lie on this court, and that the judgment of the court must be affirmed.

IV.

THE LANDS EMBRACED WITHIN THE TERMS OF SECTION 6 OF THE GRANT ARE WITHDRAWN PER FORCE OF THE STATUTE. THE LANDS IN CONTROVERSY WERE NOT WITHIN THE FORTY MILE STRIP AND WERE NOT THEREFORE WITHDRAWN BY THE TERMS OF THE STATUTE.

Irrespective of the question of a statutory or departmental withdrawal, the lands lying within the indemnity

limits of the grant are clearly open to disposition by the government, either to other corporations through legislative grants, to individuals under the homestead or pre-emption laws, or by the creation of reservations to forward some policy of the executive department, until their selection by the grantee under the direction of the secretary of the interior. It has been definitely decided in a number of cases, and so recently as the case of the United States vs. Oregon & California Company, 20 Sup. Ct. Rep. 26, that neither the withdrawal contemplated by the terms of the statute nor those ordered by the department precluded a grant by Congress to another corporation of lands lying within the primary limits of the Northern Pacific grant, prior to definite location of the road.

Within the indemnity limits, it has been settled by this court in numerous decisions, that between adverse claimants, priority of right or interest therein, depends upon priority of selection or (since the act of 1880) priority of settlement, and not priority of grant, or definite location. Where withdrawals from settlement are not involved, it has been decided as to indemnity lands that, "title to them does not vest in the railroad company for the benefit of which they are contingently granted but in the fullest legal sense remains in the United States until they are actually

selected and set apart under the direction of the Secretary of the Interior, especially for indemnity purposes." That such contingent grant is but "a promise to give the company idemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title and until it was executed created *no legal interest*, which could be enforced in the courts."

U. S. v M. K. & T. Co. 141 U. S. 358.
K. P. R. Co. v Atchinson R. Co. 112 U. S. 414.
Wis. R. Co. v Price Co. 113 U. S 496.

Other and perhaps more pertinent expressions in regard to the subject might be cited, but it will be submitted that it was clearly the legislative intent that indemnity lands should be open to the usual modes of disposition under the former statutes in relation to homestead or preemption, and to future special grants in the indemnity limits, subject, however, to such limitation as congress may have imposed in the grant through the statutory withdrawals therein contemplated, if it be true as held by this court, as above quoted, that such grant "created no legal interest to lands in the indemnity limits prior to selection." If the railroad company had no "legal interest" which could be enforced in the court prior to selection in the indemnity limits, then of any disposition which the government might make of such lands, whether under its existing

homestead laws or through future conflicting grants, the railroad company could not complain, because it had been deprived of no legal or equitable interest in the lands, and therefore could have no standing as a party in a court of equity as a complaintant.

It is true that a departmental withdrawal of such lands would amount to the same thing in effect (unless forbidden by Congress and therefore void) because it would prevent the claim of a settler from attaching to the lands pending selection, and thus enable the railroad company's title to attach before that of the settler. But such a withdrawal would create no interest to the lands in favor of the company, and would therefore remain effective only so long as the government saw fit to maintain the status.

The right of the railroad as against the settler to an interest in lands in the indemnity limits of the road prior to selection, must therefor depend, if it have any existence at all, upon a congressional withdrawal of the lands, and the first question for solution is, whether the grant itself provided for a withdrawal of lands within the limits of the grant, and second, the extent of such statutory withdrawal.

This court in numerous instances and notably in Buttz vs. N. P. R. Co., 119 U. S. 55 and in St. Paul and Pac.

vs. N. P. R. Co., 139 U. S. 1, has held that the grant itself expressed the legislative will in relation to the lands covered by the grant and provided for a statutory withdrawal of certain portions of the grant. It has in the cases above referred to and in numerous other decisions, held the orders of the department withdrawing lands within the limits of the grant from settlement, to be mere notices to the public of the terms of the grant. "A wise precaution by the department to give such information to local land officers as may serve to guide aright those seeking settlements on the public lands which the act does not require." Buttz vs. N. P. R. R. Co., supra.

The grant in question, was not a grant of any specific quantity of land; in other words the United States did not agree to convey any certain number of sections of land but only such portions as were undisposed of at definite location, with the privilege of indemnity out of such lands as were subject thereto in the indemnity limits at the date of selection.

U. S. v S. P. R. Co. 146 U. S. 570.
Wis. R. Co. v Price Co. 133 U. S. 496

The value of the grant, to-wit, the number of sections which would ultimately attach, depended upon how diligently the work on the road should be prosecuted.

N. P. R. Co. v Musser Sauntry Co. 168 U. S. 605.

Congress having thus expressed its policy that the value of the grant should depend upon the diligence of the grantee, also provided as heretofore suggested, that a certain quantity of lands should be withdrawn for the benefit of the road upon filing its map of general route. In that congress made no provisions for any other withdrawal or for the revocation of such general route withdrawal when made, it would seem to follow both from the terms of the grant and its construction by the courts, that no other withdrawal than a general route withdrawal was contemplated, and that when such withdrawal became effective the lands within the limits of such withdrawal, should remain so withdrawn from settlement, until patents should be issued to the company for such lands as they were entitled to under the terms of the grant. We believe that by no reasonable construction of the grant, can any authority be found for more than one withdrawal, or for a withdrawal of lands other than those contemplated upon the establishment of the general route of the road, or for any authority in the department to change, alter or enlarge the territory covered, or extent of the withdrawal, when the lands covered by the grant become once identified so as to come within its terms, by the filing of a map of general route approved by the Secretary.

Van Wyck v Klevano, 106 U. S. 366.

The grant was not a gift or a concession, but in the nature of a contract, in which each party sought to express in its terms all of the demands of the other to which it was willing to agree, and we suppose that the general rules relating to the construction of an ordinary contract would apply, in the general respects at least in which such rules will be revoked by the defendant in error.

The courts would neither take from the grantee any rights or privileges granted nor would it add any. Had the grant been one of a specific number of sections, the courts would not attempt to overrule the will of congress and violate the terms of the contract by depriving it of any portion of the lands conveyed, nor should they, we submit, give the company any benefit or privileges for which the parties did not at the date of the contract stipulate; it should not therefore give the company the benefit of two withdrawals where congress and the company had agreed upon one, any more than it would say that it should not have the one stipulated. If for any reason which congress should deem equitable, the grantee should have established its general route and the lands within its limits should thus become attached to the grant, and the company should desire to establish another general route and possess other lands in lieu of those covered by its grant, as thus defined, con-

gress could and we submit congress alone could, grant the desired relief. In other words, when the general route of the road became once established, the lands within its boundaries became the lands, and the only lands of the grant. The world might then adjust itself to the condition, and no power, except that of congress, could give to the grantee other lands because that would amount to a new grant.

The same principles would apply to the action of the executive department. Congress having expressed the terms upon which it was willing to convey the lands covered by the grant, and having expressly provided for such intermediate action for the benefit of the railroad as it was willing to agree to (and we believe all the grantee then asked) those benefits so far as the department had to do with them, should have been extended just as far as Congress provided; a step either way, either in extending or limiting these privileges amounting to the insertion within the terms of the grant of a new agreement ought to be held to be held void as without authority, upon elementary principles.

Burfenning v Chicago R. Co. 163 U. S. 321.

If we are not mistaken in supposing that the grant provides for a statutory withdrawal of such lands as the

parties agreed and Congress contemplated should be withdrawn for the benefit of the grantee, and that such withdrawal extended from the date of the general route withdrawal until definite location in the primary and until selection in the indemnity limits, and that the department had no authority to alter, limit or extend the contract as thus made, or the will of Congress as thus expressed, then the judgment of the Court below was clearly correct, for two reasons: first, because it appears that prior to Feb. 21, 1872, the date of the general route pleaded Transcript P. 2 the general route of the Northern Pacific R. R. Co. was established in the territory of Washington on July 30, 1870, and an order of withdrawal directed in pursuance thereof on August 13, 1870, by the Commissioner with the approval of the Secretary of the Interior.

N. P. R Co v Miller, 7 L D. 104-5-6.

The history of this general route withdrawal is fully set forth in the case last above cited, and unless the facts there stated establish the statutory general route, then none ever was established. Every requirement of the act and of the Department was complied with. The lands in controversy did not fall within the limits of this order of withdrawal nor within either the primary or indemnity limits of the general route of the road as thus located.

We do not propose to now discuss this point under this general topic, further than to say, that this court has in several instances, and as late as in the recent case of U. S. vs, Or. & Cal. R. Co. 20 sup Ct. Rep. 269, held, that the map of 1870 and the approval of the department thereon, constituted the general route of the road. If the general route of the road as thus located, constituted the general route contemplated by Congress, and the withdrawal directed by the department constituted the statutory withdrawal, then we can conceive of no authority in the department to authorize or permit the company, after all the rights and privileges to which it was entitled under its grant had thus attached, to select a second general route or to have a second general route withdrawal.

If the general route withdrawal continued until definite location in the place limits and until selection in the indemnity limits, as held by this court in Buttz vs. N. P. R. Co. supra, and the general route of 1870, constituted the statutory general route of the road, then the lands in controversy must be held to have been withdrawn, not by the terms of the grant, but by a purely departmental order.

If they were so withdrawn, then the restoration of such lands to settlement by order of the Secretary of the Interior with the consent of the president was clearly lawful.

This subject will be discussed with a citation of authorities in a subsequent point.

Second.—The lands did not fall within the limits of the statutory withdrawal upon the definate location of the road. This involves an enquiry into the question as to what lands were ... ded by Congress to be withdrawn, upon compliance by the company with the terms of the grant.

We contend that it is impossible to find words in the grant from which the congressional intent that any lands within the limits of the grant should be withdrawn from the operation of the general laws in force, prior to defenite location in the place limits, and selection of the indemnity limits, except those in sec. 6, where such intent is clearly expressed, and the *quantity limited, to* 40 *miles on each side of the road.* Within the forty mile limit it is provided that such lands should not be "liable to sale or entry or preemption before or after they are surveyed, except by said company" to-wit, at any time after their identification to

the grant by the map of general route: without the forty mile limits, it is provided that the homestead and pre-emption laws should extend "to all other lands on the line of said road when surveyed." This 40 mile strip would include all of the lands in both the place and indemnity limits of the road in the states and would include only the lands in the place limits in the Territories. If we are not mistaken in this construction, then the question as to whether the general route of 1870 or that of 1872 established the limits of the withdrawal, or whether any of our previous conclusions are well founded or not is not material, because finally the Company settled upon a line or route upon which it has take a consistent and definite stand, to-wit, its line of definite location and the lands in controversy fell *without* the limits of the 40 mile strip as thus located. (Transcript P. 3.)

It has been said by this Court that the construction placed by the department upon the laws which it is called upon to execute, will be received with great weight, "and ought not to be overruled without cogent reasons." "The officers concerned are usually able men and masters of the subject."

U. S. v Moore, 95 U. S. 760.

The question as to whether indemnity lands in the Territories were subject to withdrawal by the terms of the grant, was submitted to Mr. Justice Lamar while Secretary of the Interior in 1887. With the approval of the President he directed that the parties interested be given a hearing and after argument decided that not only did the terms of the act not provide that they should be withdrawn (outside of the 40 mile strip or place limits in the Territories) but that the terms of the act provided that they should not be so withdrawn.

In re At. & Pac. R. Co. 6 L. D. 77 et seq.

He said in his opinion in part "Sec. 6 provides, 'That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed and as fast as may be required by the construction of said railroad; and the odd numbered section of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the homestead and pre-emption laws are extended' to all other lands on the line of said road where surveyed, excepting those hereby granted to said company.'

Now here was a grant to the free alternate odd numbered sections to be found within twenty miles on each side of the road in the states and within forty miles in the territories; with the right to take the free odd numbered sections found within a further limit of ten miles as indemnity for lands lost in the granted limits The order was for the survey of the lands "for forty miles in width" or only to the extent of the granted limits in the territories and ten miles beyond the granted and indemnity limits in the states" * * * "As to the lands within the indemnity limits, the contract was based upon two contingencies; that of losing lands within the granted limits and being able to find sufficient to indemnify the company among the odd numbered sections within a further limit of ten miles. Here the interest of the company was so remote and contingent, being a mere potentiality and not a grant, that congress declined to order a withdrawal for the benefit of the same or even a survey."

In re At. & Pac. R. Co. 6 L. D. 86-7.

The opinion is an able one and worthy of consideration in its entirety, and were support to be found for our contention there only, we would submit this cause with considerable confidence.

Every Secretary from Mr. Justice Lamar to the present incumbent, has been requested to and has re considered the question at the request of the company, with such new light as subsequent decisions of the courts has shed upon the subject, with the result only of more strongly establishing the position there taken, that the grant did not direct the withdrawals of indemnity lands in the territories, but forbade it.

N. P. R. Co. v Miller, 7 L. D. 100.
N. P. R. Co. v Cole, 17 L. D. 8.
In re Fla. & Pen. R. Co. 15 L. D. 529.
M. K. &. T. Co. v N. P. R. Co. 17 L. D. 122.
N. P. R. Co. v Davis, 19 L. D. 87.
N. P. R. Co. v Lillethun, 21 L. D. 487.
S. P. R. Co. v Kanawyer, 23 L. D. 500.
Grunewald v N. P. R. Co. 24 L. D. 195.
N. P. R. Co. v St. Paul & M. R. Co. 25 L. D. 67.
N. P. R. C. v Streib, 26 L. D. 589.
Stuart v S. P. R. Co. 22 L. D. 61.

The line of the road passes through four of the then territories. To the courts of three of these, the precise question has been presented (we believe that the point has not been submitted to the supreme court of Idaho) and the construction of the department in each instance has been sustained as the law.

Elling v Trexton (7 Mont. 330.) 16 Pac. 931.
Grandin v LaBar (N. Dak.) 57 N. W. 243.
Moore v Cormode, 20 Wash. 305.

The case of Buttz vs. N. P. R. Co., 119 U. S. 55, came up from the then territory of Dakota. In that case the court held "when the general route of the road is thus fixed in good faith and information thereof given to the land department by filing the map thereof with the Commissioner of the general land office or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections *to the extent of forty miles on each side.*

In St. P. & Pac. vs. N. P. R. Co., 139 U. S. 1, this court held the limits of the statutory withdrawal to extend only to a distance of 40 miles on each side of the road. Other cases, both by this and other courts might be selected and cited to the same effect, but it seems to us useless to multiply authorities in support of a proposition so manifest, and it is submitted that the lands in question were not withdrawn *by the terms of the grant*, because they did not fall within the limits of the 40 mile strip ordered to be surveyed and withdrawn.

V.

THE ORDER OF THE DEPARTMENT DIRECTING THE WITHDRAWAL OF LANDS BEYOND THE FORTY MILE STRIP CONVEYED NO INTEREST IN THE LANDS TO THE COMPANY AND WAS REVOCABLE.

Upon the establishment by the grantee of its line of definite location, the department ordered the withdrawal of the odd numbered sections not only within the forty mile limits, but of all odd numbered sections lying within the exterior boundaries of the line of the road as thus located. Within the states through which the line of the road was thus located, the withdrawal was no doubt valid as a statutory withdrawal, but within the Territories, it has been submitted, the withdrawal of lands without the limits of the forty mile strip receives no support from the statute.

The lands without the forty mile strip, it is our construction of the grant, were left open to settlement and preemption by the express agreement of the parties. The terms of the grant are clear and unmistakable in that regard, we believe.

They were, however, withdrawn from settlement by order of the department from November 13, 1880 (Transcript, P. 3) until August 15, 1887, at which later date they

were, by order of the department with the approval of the President after a full hearing, upon notice, with the other lands of the grant lying without the forty mile strip, restored to the public domain and re-opened to settlement.

6 L. D. 77 to 93.

We understand the plaintiff in error to contend that it was within the general powers-of the Land Department to withdraw the lands from settlement, and in support of their contention they cite amongst other cases:

Riley v Welles, 76 U. S. 248.
Wolcott v Des Moines R. Co. 72 U. S. 681.
Woods v Beach, 156 U. S. 548.

None of these cases hold, however, that where the grant in aid of which the withdrawal is invoked, declares that the general land laws shall remain in force as to portions of the lands, that as to those lands the department has the power to over rule the will of Congress as thus expressed, and with-hold lands from settlement, which Congress has declared should remain open to settlement, until their selection by the Company under the direction of the Secretary of the Interior.

This Court, on the contrary has held that "the action of the Land Department cannot over rule the expressed will of Congress."

Burfenning v R. Co. 163 U. S. 321.

A withdrawal of lands without the forty mile strip would therefore be void, because in direct conflict with the will of Congress as expressed in the grant.

Assuming, however, that the department was in error in thus holding by an unbroken line of decisions from Secretary Lamar to the present incumbent, that the law forbade the withdrawal of lands without the forty mile strip, and that in regard to such lands the act neither directed nor forbade either by implication or in express terms, their withdrawal, then there is no question, we believe but that the department under its general powers might both withdraw them from and restore them to settlement.

Woolsey v Chapman, 101 U. S. 755.

Wood vs. Beach supra is a case where the principle was applied, and in some respects the facts are similar to those presented here. In that case the lands were within the indemnity limits of the grant; the line of the road was definitely located as here, prior to a settlement or a filing.

If it were true that independent of an order of withdrawal as between the settler and the grantee, such an interest would vest in the latter to indemnity lands upon

definite location, as to bar settlement or a filing upon the land by the former, then there would have been no need of discussion in that case, of the effect of a withdrawal. But in that case, the Court based its holding upon the fact that there were in force from the date of the definite location of the road until selection and patent to the grantee, two withdrawals of the lands from settlement; one statutory, clearly directing such withdrawal of such lands, the other a departmental order, and held that these withdrawals and not the definite location of the road, barred entry by the settler.

Therefore we say that this case furnishes direct authority in support of our point, that in the absence of a statutory or departmental withdrawal, lands lying within the indemnity limits of the grant remain open to settlement until they have become lawfully seggregated from the body of public lands, through their selection by the company with the approval of the Secretary of the Interior.

It has been submitted under a previous point, that the statutory withdrawal contemplated by congress, did not include the lands in question, and it is conceded that they did fall within the limits of the departmental order, by which other lands were withdrawn upon the definite location of the road, than those within the forty mile strip. No

question is raised here, but that such departmental withdrawal was effective to bar settlement unless contrary to the will of Congress as expressed in the grant, so long as the withdrawal remained in force. The question for solution is whether, where by the terms of a grant Congress has provided for a statutory withdrawal of a strip of lands forty miles in width on each side of the road, and the department has ordered the withdrawal of such lands, and in addition thereto has ordered a further withdrawal of a strip ten miles in width on each side of the road beyond the boundries of such statutory withdrawal, there is power in the department for reasons of public policy to revoke such departmental withdrawal and to restore such lands to the public domain.

There has never existed in the Department any doubt of its authority to restore lands to the public domain which it had withdrawn through its general powers

In his general order directing the withdrawal of lands lying without the forty mile strip but within the first indemnity limits of the road, Mr. Secretary Teller on May 17, 1883, used the following language clearly indicating his opinion that such withdrawal was merely departmental and discretionary, and revokable for reasons of public

policy. "If the Company neglects to make its selection and takes advantage of the withdrawals theretofore made or that may be made hereafter to withhold lands not actually needed to make good losses they have sustained, it will be the duty of the Department to revoke such order of withdrawal."

2 L. D. 516.

His successor, Mr. Secretary Lamar in his opinion revoking the order of withdrawal of lands lying without the forty mile strip held: "On a full consideration of the whole subject, I conclude that the withdrawal for indemnity purposes if permissable under the law, was solely by virtue of executive authority and may be revoked by the same authority; that such revocation would not be a violation of either law or equity, and that said lands having been so long with-held for the benefit of the company, the time has arrived when public policy and justice demand that the withdrawal should be revoked and some regard had for the rights of those seeking and needing homes on the public domain."

6 L. D. 91.

The withdrawals covering the lands in controversy were accordingly revoked on August 15, 1887, 6 L. D, 92,

and the defendents in error's filing allowed, on October 31, 1887.

Transcript P. 8.

"It has been the uniform construction of the Department that the requirment to withdraw lands on account of the Pacific Railroad grants upon the location of the roads, extended only to the granted lands; that all withdrawals of indemnity lands on account of these grants rest on executive action alone, and, consequently that such indemnity withdrawals might be revoked whenever in the judgment of the Secretary of the Interior, the necessity of the case required it."

In. v S. P. R, Co., 18 L. D. 315.
S. P. R. Co., v McWharter 14 L. D. 612.
S. P. R. Co. v Meyer, 9 L. D. 250.
N. P. R. Co. v Miller, 7 L. D. 100.

The contemporaneous construction of the statute by those charged with the duty of executing it, is entitled to great respect and "will not be over ruled without cogent reasons."

U. S. v Moore, 95 U. S. 760.

It would scarcely be consistent with the generally accepted view of the powers of the Secretary of the Interior as based upon the decisions of this Court, to say that he had

the discretionary power to withdraw land from settlement because of some existing condition which seemed to require such action, but that upon the recognition of some other or new condition which required the restoration of such lands to their normal condition, that he had no power to restore them. Such want of authority to restore the lands to the public domain would probably cause him to hesitate to exercise his authority to withdraw them, even in case where such withdrawal would seem to best subserve public interests, if his powers were so limited, because of the length of time which might be required to procure Congressional authority to act in the premises. We believe however that the powers conferred by Congress are sufficiently broad to include a revocation of a departmental order as well as its promulgation, where the order relates to the status of the public lands.

Knight v Land Association 142 U. S. 161.

There are reasons of public policy based upon the abuses of the grant by the Northern Pacific Railroad Company, which it seemes to us ought to bear heavily in favor of sustaining the action of the Secretary in revoking the order of withdrawal under consideration.

While the grant was executed in 1864 as a war meas-

ure to aid the government in the transportion of munitions of war and troops, the road was not even definitely located until 1880 and it was then only definitely located as to portions of the road. That portion extending through the Yakima Indian Reservation in the Territory of Washington in lieu of the lands lost in which, the lands in controvercy are sought to be selected, Transcript P. 6 were not definitely located until a date later than the filing of this case.

N P. R Co v Miller, 7 L D. 124-5.

From 1870 until 1880, a wide strip of land remained under a cloud in this territory by reason of the several maps of general route filed by the company, amongst others, the Perham map, the map and withdrawal of 1870, and the map and withdrawal of 1872, each covering a widely different territory, and acting as a check upon the settlement of the public lands in this state.

From the definite location of the road in 1880 until 1887, not only had all the lands which Congress agreed should be withdrawn, been withdrawn, but lands which Congress expressly declared should remain open to entry and settlement, were withdrawn for the benefit of the grantee. During these seven years the company had not yet so adjusted its line of definite location as make it appear to

the satisfaction of the land department as to what losses it had suffered.

It claimed large losses in its main limits but was able to establish to the satisfaction of the Secretary only comparatively a small quantity in this state.

N. P. R. Co. v Miller, 7 L. D. 124-5.

The several Secretaries of the Interior who have been called upon to act with reference to the grant under consideration have expressed in strong terms in some of the cases herein before cited, their condemnation of the neglect of the company to exercise its right of selection promptly, and thus remove the bar to settlement which the several withdrawals constituted. Finally when Secretary Lamar revoked the orders of withdrawal in 1887, it is a part of the history of the territories effected, that a large number of persons settled upon lands similarly situated to these and built thereon homes. They have made improvements, brought the lands under cultivation, built valuable houses, planted orchards and made wise provisions for old age, acting in full faith upon the promise of the government contained in Secretary Lamar's order restoring the lands to settlement, to convey to them good and sufficient titles to the land.

In 1888, a neighbor of the defendant in error, prosecuted his case upon facts in all essentials identical with those here, through the Department, Miller vs. N. P. R. Co., supra and received a patent, and his case became a precedent not only to guide the Department in its future decisions but settlers in their future course. Instead of buying their lands from the railroad, upon the precedent thus established, they bought from the government and the railroad sold the same lands to others, so that the settler is without remedy, if it be held that Secretary Lamar's order was without authority of law.

No attempt was made by the company to bring the Miller case or a similar one to this Court upon whose authority alone the Department would consent to change its ruling.

In other words, more than twenty years have elapsed since the order restoring these lands to settlement was made, the face of the country has changed from its then pioneer condition to that of a prosperous farming community and now for the first time, consistent with its dilitory policy throughout its entire history, the railroad company has brought a case here in the name of its grantees to determine the validity of Secretary Lamar's order. All the

world, except the Company has adjusted its affairs to the condition resulting from such order, and it seems to us that it would be more equitable to require the Company to conform to the existing conditions, than that the rest of the world should be required to turn back to twenty years ago.

Not only has it been the uniform holding of the Department, that a departmental order withdrawing public lands from settlement was revocable for reasons of public policy by the Secretary of the Interior with the approval of the President, but this Court has clearly indicated its opinion that such power was vested in the executive department.

In Wood vs. Beach supra, in holding the departmental order thereunder consideration, to constitute a bar to a filing upon the lands in controversy, it was said; "This withdrew the lands from private entry, and as we held in Riley vs. Welles, was sufficient to defeat a settlement for the purpose of a pre-emption, *while the order was in force*, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal. It is not conceivable that in using the words italicised, the Court meant until an act of Congress should over rule the Departmental order and thus suspend its force; on the contrary we construe these words to limit the

order of withdrawal thereunder consideration to such time as it remained unrevoked by the agency of the government upon whose authority the order was promulgated.

It is certain that the order of withdrawal in this case was not in force at the time of the entry, and being a mere departmental order it was not a matter with reference to which Congress would ordinarily take cognizance. Not being in force, having been revoked by the authority of the agency which gave it force, it follows from the logic of Wood vs. Beach that the order did not constitute a bar to an entry of the lands.

We suppose that argument is unnecessary in support of the proposition, that a departmental order. such as that under consideration in Wood vs. Beach and in this case, did not convey any interest in the lands to the Company because if it did, then we suppose that neither Congress nor the President could revoke it, because such revocation in such case would amount to confiscation and be therefor void, and the limitation in Wood vs. Beach supra that a departmental withdrawal barred entry only, "while the order was in force," would be meaningless. Clearly the language quoted meant that the order barred an entry so long as it remained unrevoked by the executive depart-

ment which in the exercise of its implied powers and of the control vested in it by Congress over the public lands had made the order. It did not mean, we submit, that such order remained in force until over ruled by the Legislative Department from which source the order derived no authority and contrary to the will of which, it seems to have been conceded in that case as it certainly was in this, the order was issued.

The lands here were not "included in any reservation by any treaty, law, or proclamation of the President for any purpose" as were those in Wood vs. Beach supra because there was no such reservation existent at the time of the entry. Such reservation as had existed has been revoked and the lands restored to the public domain by the Secretary of the Interior with the approval of the President, after which and before any lawful selection of them by the Company, the defendant in error, filed on the lands and his filing was allowed by the department.

It would be difficult to find any authority in the Executive Department authorizing a withdrawal of lands in aid of a grant to a railroad, except that contained within its general powers and supervision over the public lands.

If those powers were broad enough to create a reservation not contemplated by Congress by a departmental order they were certainly broad enough upon elementrry principles to authorize a revocation of such order and the restoration of the lands reserved to the public domain.

Knight v United Land Assn 142 U. S. 161.
Bishop of Nesqually v Gibbon, 158 U. S. 155.
Williams v United States, 138 U. S. 514.

VI.

THE ALLEGED SELECTIONS, PRECEEDING THE ENTRY, WERE NOT APPROVED BY THE SECRETARY OF THE INTERIOR AND WERE INSUFFICIENT TO DEFEAT THE ENTRY OF THE DEFENDANT IN ERROR.

Assuming that the lands in controversey did not fall within the statutory withdrawal contemplated by Congress, and that the Departmental withdrawal was lawfully revoked prior to the entry by the defendant in error, the right of the plaintiff in error to the lands must be measured by the effectiveness of the selection of these lands by the Company prior to the entry. These selections are pleaded at Transcript P. 5-6.

It has hereto fore been submitted that these allegations were insufficient as a matter of practice in that it was neither pleaded that the selections were approved by the Secretary nor were facts pleaded excepting the case from the rule requiring such pleading.

All that is pleaded might have been true and yet the Secretary have lawfully refused to approve the selection of the specific lands claimed.

The point which will now be discussed is, whether the facts found by the Department in this case, incorporated into the pleading by the reference in the decision of the Commissioner to the cases cited, were such as to authorize this court in a collateral proceeding to indirectly coerce the Executive Department into an approval of the alleged selections of 1883 and 1887.

In other words where Congress has imposed a judicial discretion in the Secretary of the Interior to approve or disapprove the selection of the Company of certain lands within the indemnity limits in lieu of lands lost in the place limits of the road, and the Secretary has exercised that discretion in good faith and has rejected the proposed selections can the Courts review such action in a collateral

proceeding, and substitute in effect its approval for that of the Secretaries by a decree finally allowing such selection?

To answer this question affirmatively it must be conceded is to hold, that the Secretary's approval is not essential to title to lands within the indemnity limits of the road.

The rule as we understand it to be, is that the Courts will not, so long as the title to the lands remains in the United States interfere with the action of the Land Department. That when the Department has finally exercised the discretion vested in it, and has issued a patent, that then if it appears upon the facts as found by the Department that an error of law has been committed, or that fraud has been perpetrated or a mistake made, that then the error may be corrected by a court of equity.

As to the facts, the findings of the Department in the absence of fraud or imposition, are conclusive, and it is upon the facts as found by the Secretary in passing upon these selections, that their validity must be measured here.

Lee v Johnson, 116 U. S. 48.
Johnson v Towsley, 13 Wal. 72.
Shepley v Cowan, 91 U. S. 330.
Moore v Robbins, 96 U. S. 530.
Marquez v Frisbie, 101 U. S. 473.
Vance v Burbank, 101 U. S. 514.
Sanford v Sanford, 139 U. S. 642.
N. P. R. Co. v Colburn, 164 U. S. 383.

The claim of selection of 1883 was based upon the assertion that the entire unappropriated portion of the indemnity limits of the road, were insufficient to indemnify the Company for losses within the main grant.

Miller v N. P. R. Co. 7 L. D. 123-4-5.

It was such a claim as is pleaded in the complaint at par. VII, Transcript P. 5.

"It gave no indication of the basis upon which a right of selection of this track could be claimed. It proceeded upon the assumption that the Company might select as many lands as it saw fit and make proof of its losses afterwards."

N. P. R. Co. v Miller, 7 L. D. 123-4.

This claim that the indemnity limits were insufficient to satisfy losses in the place limits of the road, has frequently been made upon the Land Department and was passed upon at as late a date as December 20, 1897, in re N. P.

P. Co., 25 L. D. 512, where it is shown that there was no foundation for such claim and that the Company had been so negligent in the adjustment of its losses and had made claims for indemnity so extraordinary, that the Secretary could not in justice to the Government, upon the facts, approve of the selection.

In the Land office decision last above cited, the Secretary said in reference to an official letter of the Department, "This letter shows that there has been no actual ascertainment of the amount of the deficiency or that any deficiency exists, and that any statements or certifications upon this subject heretofore made by your office are only estimates, based amongst other things, upon an approximation of the percentage of lands which may hereafter prove to have been excepted from the grant by reason of their mineral character."

For reasons stated in that opinion, the Secretary, (acting Secretary Ryan,) in 1897, rejected the bulk claims of selection of the N. P. R. Co., and required it, as his predecessors had done since Secretary Lamar's order, (4 L. D. 90), to specify the particular losses for which indemnity was demanded, and it is submitted that this Court ought not to hold the claim of indemnity of 1883 to be valid, where every

Secretary from the date of its submission until now has disapproved of it upon grounds of public policy. The finding by the Secretary that there was no deficiency in the grant, disposes of the claim of the right of a bulk selection, and brings the claim within the rule requiring a tract for tract selection or such other proper regulations as the Department might require for the protection of public interests. Such a selection was not made until after the filing upon the lands by the defendant in error.

The selection of 1887 was equally insufficient to pass title to the Company of the lands in question.

It was made after the settlement of the defendant in error upon the lands.

Settlement since the act of 1880 constitutes the initial step in the establishment of a homestead claim.

The patent in conclusive upon the question of the good faith of such settlement. Within the time required by the rule promulgated by Secretary Lamar in his order of August 1887, the defendant in error filed upon the land and his filing was allowed.

Transcript P. 7-6 L. D. 92.

Such settlement excepted the lands from selection by the Company exactly as did entry, when prior to 1880, a filing was the initial step in perfecting a claim of homestead.

The holdings of this Court to the effect that mere settlement and occupation by a qualified homesteader upon lands within the limits of a railroad grant in the absence of a record of such claim in the land office, do not operate so as to except the lands from the grant, were all in cases where entry constituted the initial step to a homestead claim, and each of the cases emphasize the fact that such occupation was not followed by a filing.

The grant to the N. P. R. Co., provides that the lands granted shall be "free from pre-emption or other claims or rights" since the act of 1885, settlement or occupation by a qualified homesteader clearly constitutes a claim and right: and such a claim and right ought to be protected because it is invited by the government, where, as in this case, within the time prescribed by the Department, entry was regulrly made of the lands in the local land office.

It seems to us that such a claim excepts the lands from the right of selection of the Company within the indemnity limits of the road.

N. P. R. Co. v Logging Co. 168 U. S. 605.
N. P. R. Co. v DeLacey, 174 U. S. 622.
N. P. R. Co v Sanders, 166 U. S. 620.
N. P. R. Co. v Colburn, 164 U. S. 383.

The claim of selection of 1887 was subject to the same objections as was that of 1883.

No finding was ever made by the Secretary that the that the lands in the indemnity limits were insufficient to satisfy losses in the place limits.

The amount of losses in the place limits of the road had not been ascertained. The line of the road was not definately located across this then Territory, and a claim of indemnity was and is now made, Transcript P. 5, on account of losses occurring within the route surveyed (but not in 1887 located) across the Yakima Reservation.

N. P. R. Co. v Miller, 7 L. D. 123-4-5.

It has been the uniform holding both of the Departpartment and this Court, that a claim for indemnity is without basis, prior to the definate location of the road, and it would follow that a bulk selection (as were the claims for indemnity of 1883 and 1887) based upon estimated losses, which include a portion of the road not definately located, would be void as a whole.

Speaking of the claim of selection of 1887, Secretary Vilas in N. P. R. Co. vs Miller, supra, said, "That list excellently illustrates the necessity for the rule mentioned." (The order of Secretary Lamar hereinbefore cited requiring a specification of losses.) Since 1883, the claim of this Company to take 58,000 acres in list number 2 has remained a cloud within all the lands embraced within it. Yet when called upon to specify particular lands lost from the granted limits for which a right of selection can exist, only 4011 acres are shown, except by claiming indemnity for about 58,000 acres of lands for the most part not particularly defined, lying within the Yakima reservation. But that Indian reservation lies about 200 miles Southwesterly from the lands of Miller; North of and opposite of that portion of the main line along the Columbia river, embraced in the map of general route of 1870. Those lands stand yet only as provisionally granted, the line of the road has not yet been definitely located and no construction whatever has been begun upon it. (The lands in controversy lie in three townships East of the lands in the Miller case.)

The Company may perhaps in the exercise of the right of definite location, so change the main line of its road, that the Yakima reservation shall not be within the granted limits of the main line.

In order to do this, it would not be necessary to make so radical a departure as was made from that line by the definite location East of the Columbia River. But, discarding that supposition, no absolute right of selection for lands lost from the granted lands can possibly arise until the line of definite location is made. It is unnecessary to elaborate so plain a proposition.

Continuing, the Secretary shows that losses have not been established along the line in this state up to that date (August 3, 1888,) a year after the defendant in error's filing upon the lands) in excess of 4011 acres, which loss the Secretary directed to be satisfied out of the lands selected by the Company lying nearest to the losses established, tracts lying far to the West of those claimed in this suit.

L. P. R. Co. vs. Miller, 7 L. D. 124-5.

This case was not intended to be nor has it been considered by the Department as establishing the rule of the case decided only, but as governing and deciding the cases of a large number of others claiming lands within the same locality, and the facts found by the department in the Miller case, have been adopted by reference in all similar subsequent departmental decisions. It would appear therefore, that at the date of the filing in question here, there

was no bar to entry arising from an existing order of withdrawal, nor from an approved selection, the department having fully exercised the discretion vested in it and protected the rights of the company by approving such selections of the company as had the lawful basis of established losses in the indemnity limits up to that time, out of other lands included within the list of selections filed by the company lying nearer the established losses.

That the Secretary may in the exercise of his discretion, direct the selection of lands nearest to the line of the road is in accord with the departmental rulings since the promulgation of Secretary Lamar's circular of August 4, 1885. 4 L. D. 90.

In re At. & Pac. 8 L. D. 373.
N. P. R. Co. v John O. Miller, 11 L. D. 428.
In re S. M. R. Ex. Co. 12 L. D. 518.
In re F. C. & P. R. Co. 15 L. D. 529.

Such regulation of indemnity selections by the Secretary has received the approval of this court.

Woods v Burlington R. Co. 104 U. S. 329.

The department in re N. P. R. Co., vs. John O. Miller 11 L. D. 428, based its holding that a bulk selection without the specification of losses was invalid upon the following sound reasoning: "Where lands are settled upon which

have been selected by the company in lieu of an equivalent quantity of lands without designating the particular bases for each tract, and any part of the basis should for any cause be disallowed it would be impossible to determine which of the selections should be rejected and which retained."

It had always been a rule of the department in the adjustment of indemnity selections to require a specification of particular losses for which indemnity was sought On March 28th, 1883, Secretary Teller issued an order excepting the N. P. R. Co., from the necessity of specifying losses with its lists of selections. A copy of this order appears in 12 L. D. 196. It's purpose was to expedite the adjustment of the claims of the company, so that the unselected portion of the lands included within the limits of the executive withdrawals might be restored to settlement.

It being evident that such course instead of aiding settlement, impeded it, Secretary Lamar modified this order on August 4, 1885 by requiring the specification of losses to accompany future selections and directing all selections to be made "from vacant unappropriated land within proper sections and limits nearest the granted sections in which the losses occurred."

4 L. D. 90 Supra.

The selection of the lands in controversy had not been approved by the Secretary of the Interior up to the date of this order, and no title or interest had then, therefore under the frequent rulings of this court passed to the company.

The Secretary was therefore authorized to insist upon the Company's complying with the terms of the grant and making proof of its losses and such other reasonable requirements as were contained in the order as a prerequisite to his approval.

The lists of 1883 were not however necessarily held for naught by the Department though they clearly might have been.

Frequently lists of such selections were approved upon proper specification of losses but never where intervening rights of settlers had attached.

Wiley v N. P. R. Co. 22 L. D. 606.
LaBar v N. P. R. Co. 17 L. D. 406.

The lists not having been approved and there being no reason why the Secretary in the absence of a specification of losses, should do more than disapprove of them, he might in the exercise of the discretion vested in his office say that he would not require the re-specification of the

selections with proof of losses but might hold the lists at the request of the Company subject to proof of losses, and approve such selections appearing within such lists as met with other requirements of the order, subject to intervening claims of settlers, because thereby the Company was saved the expense of filing new lists, the Department the toil of an examination of such new lists, and the lands in the meantime would remain subject to the rights of settlers exactly as though the original claim of selection had been formally rejected as insufficient under the new order. It is to be noted that the order of May, 1883, did not vest any interest in the lands included within the lists thereby authorized to be filed prior to the approval of the selection thereof by the Secretary upon proof of losses.

Instead of standing upon its claim of selection of 1883 to the lands embraced within the lists then filed, the Company on October 26, 1887, filed a new list of selections. (Transcript P. 6.)

This new list, it is pleaded, was in accordance with the instructions of the Department, but the only instructions in that regard were those contained in Secretary Lamar's order of August 4, 1885, supra, which did not require a

new list at all but protected all lawful claims appearing within the list of 1883.

These lists or claims of selection of 1887 the department held to constitute an abandonment of the claim of 1883, except in cases where no equities intervened.

La Bar vs. N. P. R. Co. 17 L. D. 406.
N. P. R. Co. vs. Lynch 22 L. D. 609.
S. P. R. Co. vs. McKinley 22 L. D. 493.
State of Wash. v N. P. R. Co. 22 L. D. 482.
Wiley vs. N. P. R. Co. 22 L. D. 606.
N. P. R. Co. v Holtz 22 L. D. 309.
John O. Miller v N. P. R. Co. 1 L. D. 428.
N. P. R. Co. v Grunewald 24 L. D. 195.

In all cases, however, where subsequent to the filing of the lists of 1883, and prior to the approval thereof, qualified homesteaders had settled upon the lands, the department has uniformly rejected such selection upon the ground that such settlement constituted a claim and right under the terms of the grant sufficient to except such lands from the selection.

The claims of selection of 1892 and 1893 need no consideration because prior to their submission to the department, the entry of the defendant in error had been allowed and status of the land must be determined as of the

date of the finding. If they were then subject to entry, the equitable title of course passed with the patent.

If the rulings of the department hereinbefore cited are examined, it will appear that this is not a case covering a few acres of land alone, but that the most important rules of the department by which the bulk of the public lands within the limits of almost every railroad grant in the country has been disposed of are involved and that the reversal of this case would overthrow precedents of 20 years standing and bring the utmost confusion in the Department.

The basis of the plaintiff in error's contention is, that prior to the approval of the Secretary, title or at least an interest to lands within the indemnity lands may pass to the company.

The contention has been so often submitted to this court and in so many ways that we submit that the question is no longer open for argument.

"The uniform practice is that no title of indemnity lands becomes vested in any Company or in any state until the selections are made and they are not considered as

made until they have been approved as provided by statute, by the Secretary of the Interior.

U. S. v M. K. R. Co. 141 U. S. 358.
St. P. R. Co. v Winona R. Co. 112 U. S. 720.
Sioux City R. Co. v Chicago R. Co. 117 U. S. 228.
Cedar Rapids R. Co. v Herring, 110 U. S. 27.
M. K. &. T. Co. v K. P. R. Co. 97 U. S. 491.
Wis. R. Co. v Price Co. 133 U. S. 496.
Wis. R. Co. v Forsythe, 159 U. S. 54.
U. S. v Colton Co. 146 U. S. 615.
Ryan v R. R. Co. 99 U. S. 382.

It is submitted that because prior to the approval of the selection of the lands in controversy, and prior to the establishment of definite losses as a basis of such selection, the defendant in error had not only settled upon but had filed upon the lands in the local land office, that his settlement and filing excepted the lands from selection by the Company, and that the patent was properly issued under the established precedents both of this Court and of the Department.

Respectfully Submitted,

CHARLES M. WYMAN,
THOMAS NEILL,

Attorneys for Respondent.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 148.

J. M. MOORE, PLAINTIFF IN ERROR,

vs.

D. B. STONE, AMMVILLIS ALLEN, ALMA MAY STONE, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED MAY 4, 1899.

(17,394.)

(17,394.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 284.

J. M. MOORE, PLAINTIFF IN ERROR,

vs.

D. B. STONE, AMMVILLIS ALLEN, ALMA MAY STONE, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1899.

1 In the Superior Court of the State of Washington for Garfield County.

J. M. MOORE, Plaintiff, *vs.* D. B. STONE, AMMVILLIS ALLEN, ALMA May Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, Defendants.	No. 3124. Amended Complaint.

Plaintiff herein, for amended complaint and cause of action, alleges:

I.

That at all the times hereinafter mentioned the Northern Pacific Railroad Company was a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as should be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget sound, with a branch line via the Columbia river to a point at or near Portland, in the State of Oregon.

2 II.

That the third section of said act of Congress is in words and figures as follows, to wit:

"And be it further enacted, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the speedy and safe transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the

United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, that the railroad company receiving the previous grant of land may assign
3 their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided, further, that all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided: And provided, further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: And provided, further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Northern Pacific railroad.'"

III.

That the fourth section of said act of Congress was and is in words and figures as follows, to wit:

"And be it further enacted, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as afore-
4 said, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, that not more than ten

sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: Provided, also, that lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act."

IV.

That the sixth section of said act of Congress was and is in words and figures as follows, to wit:

"And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

V.

That the twelfth section of said act of Congress was and is in words and figures as follows:

"And be it further enacted, That the acceptance of the terms, conditions and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States."

VI.

That said railroad company accepted the terms, conditions, and impositions of said act of Congress in writing, under its corporate seal, pursuant to the direction of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the President of the United States.

VII.

That by joint resolution of Congress approved May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad

Company to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes," it was resolved and provided in words and figures as follows, to wit:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation, and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to
6 locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main line to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound, and in the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States and designated by odd numbers in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four, and that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points: Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized at the expiration of five years after the completion of the entire road shall be subject to settlement and pre-emption like other lands at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the
7 mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceedings or the mortgaged lands hereby granted or any of them be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the

highest and best bidder: Provided further, that in the construction of the said railroad American iron or steel only shall be used, the same to be manufactured from American ores exclusively."

VIII.

That said railroad company, *in* the 21st day of February, 1872, filed in the office of the said Commissioner of the General Land Office of the United States a certain map or plat showing the general route of its main line of railroad from a point on Lake Superior, Wisconsin, westerly to and through the then Territory (now State) of Washington to Wallula.

That upon the filing of said map or plat on said 21st day of February, 1872, showing the general route of the main line of said railroad from Spokane to Wallula, in said Territory (now State) of Washington, the said Commissioner of the General Land Office, under and in pursuance of the directions of the Secretary of the Interior, marked and designated upon the maps and records of his office the limits of the lands granted by Congress to said railroad company to aid in the construction of said railroad opposite to and coterminous with said line of railroad, as shown on said plat, to wit, forty-miles limit on each side of said line of the general route of the main line of said railroad.

That thereafter said Commissioner of the General Land
8 Office, acting under the direction and in pursuance of the instructions of the Secretary of the Interior, transmitted to the United States district land officers for the district within which said premises were and are situate a diagram of that portion of said general route of the main line of said railroad with the said forty-miles limit indicated thereon, and that said Commissioner of the General Land Office, so acting under the direction and in pursuance of the instructions of the Secretary of the Interior, ordered and directed that the lands within said limits be, and the same were thereby, withdrawn and held reserved from sale or homestead or other entry, and directed the United States district land officers of said land district to withdraw and hold reserved all of said lands within said described limits from sale, pre-emption, or homestead entry, which said letter of instructions to said district land officers and said diagram and plat were received and filed in said district land office on the 22nd day of April, 1872; that the N. E. ¼, sec. 3, T. 13, R. 42 E., W. M., was within 40 miles of said general route.

IX.

That thereafter the said railroad company proceeded with the work of surveying, locating, and building the line of its said railroad, and on the 4th day of October, 1880, said railroad company definitely located and caused to be filed a plat or map of that portion of its main line of said railroad extending from the city of Spokane, in the county of Spokane, in the then Territory (now State) of Washington, to the said Wallula, in the then Territory (now State) of Washington, which said map or plat of definite location of said

railroad had theretofore been transmitted to the Secretary of the Interior, and upon the said 4th day of October, 1880, said map or plat of definite location was accepted by the said Secretary of the Interior and by him caused to be filed in the office of the
9 Commissioner of the General Land Office of the United States of America.

That upon the filing of said map or plat of definite location on the 4th day of October, 1880, of that portion of said railroad extending from Spokane to Wallula, in the then Territory (now State) of Washington, so approved and filed, as aforesaid, the said Commissioner of the General Land Office, acting under the instructions and directions of the Secretary of the Interior, marked and designated upon the maps and records in his office the limits of the lands granted by Congress to said railroad company to aid in the construction of said railroad, opposite to and coterminous with said line of railroad, as shown on said map or plat, forty and fifty mile limits on each side of said line of definite location.

That thereafter the said Commissioner of the General Land Office, under the directions of the Secretary of the Interior of the United States, transmitted to the United States district land officers for the district wherein the hereinafter-described premises were and are situate, to wit, at Walla Walla, Washington, a diagram showing that portion of said railroad so definitely fixed, as aforesaid, with the place and first indemnity limits indicated thereon, and the said Commissioner of the General Land Office, so acting under the instructions and directions of the Secretary of the Interior, withdrew and held reserved all of said lands within said described limits from sale or homestead or other entry, and directed the United States district land officers of said land office to withdraw and hold reserved all of said lands within said described limits from sale or entry, and said letter of instructions to said district land officers and diagrams were received and filed by them, the said district land officers, on the 30th day of November, 1880.

X.

That that certain tract or parcel of land situate, lying, and
10 being in Garfield county, State of Washington, and more particularly described as the northeast one-quarter of section three, in township thirteen north, range forty-two east, Willamette meridian, was and is opposite to and coterminous with said line of definite location so fixed on October 4, 1880, as aforesaid, and was and is more than forty miles, but less than fifty miles, distant from the said line of definite location of said railroad and within said first indemnity limits, and was at the date of said grant to said railroad company and on February 21st, 1872, and on April 22nd, 1872, and at the time when the line of said railroad through the Territory (now State) of Washington was definitely fixed and located and a plat thereof approved and filed in the office of the said Commissioner of the General Land Office in the manner and upon the date aforesaid, and on the 30th day of November, 1880, public land of the United States, to which the United States had full title,

not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights, and was and is non-mineral.

XI.

That upon the filing of said orders of withdrawal and the premises and by virtue thereof and the filing of each of them the said premises, to wit, the northeast quarter of section three, in township thirteen north, range forty-two east, Willamette meridian, in Garfield county, State (then Territory) of Washington, became and thereafter remained withdrawn from and not subject to sale or other entry under the laws of the United States.

XII.

That prior to the year 1885 said Northern Pacific Railroad Company definitely located the whole of the main and branch lines of its said railroad and caused maps or plats of said definite
11 location of the whole of its main and branch lines, approved by the Secretary of the Interior, to be filed in the office of the said Commissioner of the General Land Office.

That prior to 1888 said Northern Pacific Railroad Company constructed and completed its said railroad and telegraph line so definitely located, as aforesaid, upon the lines of such definite location, extending from Lake Superior to Puget sound (both main and branch lines), in all respects as a first-class railroad and telegraph line; that as fast as portions of said railroad and telegraph line equal to or exceeding twenty-five miles in length were so constructed, as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress; that such reports were accepted and approved by the President of the United States, as provided in said act of Congress approved July 2, 1864.

XIII.

That at the respective dates of the definite location of the various portions of the whole of the said main and branch lines of said railroad and within the primary limits of the grant to said railroad company there were ten million six hundred and twenty-four thousand seven hundred and forty-six and twenty-seven one-hundredths (10,624,746.27) acres of land which were lost from said grant by reason of the exceptions contained in said act of Congress of July 2, 1864; that at said respective dates of definite location there were within the indemnity limits prescribed in said act of Congress approved July 2, 1864, not more than seven million one hundred and seventy-seven thousand seven hundred and sixty nine and seventy-one one-hundredths (7,177,769.71) acres of land subject to selection under the terms of said act of Congress of July 2, 1864, as indemnity for lands excepted from said grant.

12 That of said ten million six hundred and twenty-four thousand seven hundred and forty-six and twenty-seven one-hundredths (10,624,746.27) acres of land so excepted from said grant, and for which said railroad company was entitled to receive lands in lieu thereof, not more than two million eight hundred and eighty-seven thousand and seventy-six and fifty-seven one-hundredths (2,887,076.57) acres were lost to and excepted from said grant subsequent to the passage and approval of said act of July 2, 1864, and said last-mentioned two million eight hundred and eighty-seven thousand and seventy-six and fifty-seven one-hundredths (2,887,076.57) acres of said total of ten million six hundred and twenty-four thousand seven hundred and forty-six and twenty-seven one-hundredths (10,624,746.27) acres, so lost, as aforesaid, was the only portion thereof which could or can be satisfied under the provisions of the said joint resolution of Congress approved May 31, 1870, and that the total area of lands in the indemnity limits of said grant to said company, subject to selection as indemnity at the respective dates of the definite location of the various portions of the line of said railroad, lacked more than five hundred and fifty thousand acres of being sufficient to satisfy the losses of said grant.

That plaintiff alleges that by virtue of the premises and upon the definite location of the line of said railroad the said Northern Pacific Railroad Company became the owner in fee-simple of the northeast quarter of section three, in township thirteen north of range forty-two east, Willamette meridian, in Garfield county, in the then Territory (now State) of Washington.

XIV.

That on the 12th day of December, 1883, the said Northern Pacific Railroad Company selected the northeast quarter of section 13 three, in township thirteen north of range forty-two east, Willamette meridian, in Garfield county, in the then Territory (now State) of Washington, under the direction of the Secretary of the Interior, under the provisions of the said acts of Congress, as indemnity and in lieu of other lands excepted from its grant; that, so acting under the direction and instructions of the Secretary of the Interior, and on the said 12th day of December, 1883, said railroad company filed in the United States district land office at Walla Walla, in the then Territory (now State) of Washington, which was the district in which said tract so selected was situate, its certain list No. 1, showing its said selection of said premises, and at the time of filing said list the said railroad company tendered and paid to said officers of said United States district land office all the fees required by law; that at the date of said selection said tract so selected was public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, except as herein set forth, and was free from pre-emption or other claim or any claim or rights or right, which list was accepted, allowed, and approved by said officers of the district land office at Walla Walla on January 5, 1884, and on said date trans-

mitted said list to the Commissioner of the General Land Office, at Washington, D. C., which was within a few days thereafter received by said Commissioner; that on Oct. 26, 1887, in compliance with and in pursuance of certain orders and directions subsequently made by the Secretary of the Interior, said railroad company did designate the losses for which the above mentioned and described premises were selected as indemnity; that by reason of the facts hereinbefore set forth the said Northern Pacific Railroad Company became the owner in fee and entitled to the immediate and exclusive possession of said lands and the whole and every part thereof, and was the owner of the complete equitable title therein and thereto.

14 XV.

That said railroad company selected the above mentioned and described premises in lieu of the following mentioned and described property, to wit:

Lot one was selected in lieu of lot 4, sec. 7, T. 19, R. 6, and lot two was selected in lieu of lot —, sec. 15, T. 20, R. 6, and S. W. ¼ of N. E. ¼ was selected in lieu of N. W. ¼ of N. W. ¼, sec. 15, T. 20, R. 6, and the S. E. ¼ of N. E. ¼ was selected in lieu of N. W. ¼ of N. E. ¼, sec. 21, T. 20, R. 6, which property in this paragraph described, in lieu of which the said N. E. ¼ of sec. 3, T. 13 N., R. 42 E., was selected, was excepted from said grant to said railroad company and had before the selection, as aforesaid, been patented to private entrymen; that said tract so designated as a loss and in lieu of which said selection was made is coterminous with and within forty miles of said line of definite location of the said Northern Pacific railroad in the then Territory (now State) of Washington, said tract so lost being the same quantity as that so selected.

XVI.

That on July 2nd, 1895, said Northern Pacific Railroad Company, for and in consideration of the sum of one hundred and thirty-five and sixty one-hundredths dollars ($135.60), sold and conveyed by general warranty deed the north half of section 3, in township 13 north of range 42 east of the Willamette meridian, in Garfield county, State of Washington, to the plaintiff herein, which said sum was so paid by the plaintiff to the said Northern Pacific Railroad Company in cash.

XVII.

That on the 30th day of June, 1884, defendant presented an application to make pre-emption declaratory statement for the above mentioned and described premises so selected, as aforesaid, to and in the district land office of the United States at
15 Walla Walla, Washington, alleging settlement upon land April 25th, 1882; which application was rejected, and on appeal to the Commissioner of the General Land Office a hearing in the matter was ordered to determine the condition of the said land at the date of the selection thereof, and to determine the status

of said lands and the rights of said defendant and the Northern Pacific Railroad Company therein and thereto; that such hearing was had before the officers of said United States district land office at Walla Walla, Washington, which officers held and decided that the said settlement and application to file the said pre-emption declaratory statement above mentioned excepted said lands from the said grant to the Northern Pacific Railroad Company, and for these reasons that the said lands were not subject to selection by said company, made by it, as aforesaid, and said register and receiver thereupon recommended that said selection be cancelled as to the property hereinbefore described, which decision was rendered on the — day of January, 1891, and thereafter an appeal was taken from the decision of the register and receiver of said land office to the Commissioner of the General Land Office, and thereafter, to wit, on or about the — day of April, 1896, the General Land Office decided adversely to said railroad company, and thereafter an appeal was taken to the Secretary of the Interior, and on May 20th, 1896, said Secretary of the Interior decided said matter adversely to the said railroad company; which said decisions of the Commissioner of the General Land Office and of the Secretary of the Interior are in words and figures as follows, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 30th*, 1895.

NORTHERN PC. R'Y CO.
v.
DIMON B. STONE.

16 Involving D. S. application for the N. E. ¼, sec. 3, t'p 13 N., R. 42 E.

Register and receiver, Walla Walla, Wash.

SIRS: I have considered the contest case of N. P. R. R. Co. *v.* Dimon B. Stone, involving N. E. ¼ 3, 13, 42, the records in which were transmitted by your letter of Feb. 11th, 1891, on appeal by said R. R. Co. from your decision in favor of Stone.

The land is within the limits of withdrawal upon the line of amended general route of said road, the map showing which was filed Feb. 21st, 1872, and upon the definite location of the road it fell within the indemnity limits, the order for withdrawal of which was received at the local office Nov. 30th, 1880.

These withdrawals have been held by the department to be without authority of law and of no effect (17 L. D., 8, and 19 L. D., 87).

On Jan. 5th, 1884, Dimon B. Stone presented an application to make pre-emption declaratory statement for this land, and alleged that he settled upon the land April 25th, 1882, and has resided thereon with his family ever since; that he fenced the whole place and put twenty acres in cultivation and built a house, and that his improvements are worth about $350.

On July 3rd, 1884, your office rejected said application for conflict with the claim of said R. R. Co., and upon appeal to this office a hearing in the matter was ordered by letter "F" of October 3rd, 1888, to determine the condition of the land at the date of Co.'s selection thereof.

Upon the issuance of notice to the parties a hearing was had and concluded in the case Jan. 5th, 1891, at which both parties were represented.

The testimony adduced at the hearing shows that Stone is a qualified settler, and established his actual residence with
17 his family on the land about the middle of April, 1882, in a cabin he had built upon the tract; that in the summer of 1882 he built a house 16 x 24 ft., one and a half stories high, dug a well, and cultivated a garden; that in 1883 he cropped 15 acres to grain, in 1884 and 1885 15 acres, and in 1886 and 1887 40 acres, in 1888 45 acres, in 1889 140 acres, and in 1890 155 acres; that he has fenced the whole place, and that his improvements are worth from $700 to $800.

You are of the opinion that Co.'s selection as to this land was improperly allowed, and that the Co. had no right to the tract prior to its selection, and that as the land was occupied and improved as the home of a qualified settler at the date of selection, that such selection as to the land in question should be canceled and Stone's application to make pre-emption should be overruled; your ruling is in accordance with the uniform practice of the department, and I concur in same.

Therefore your decision is sustained and the amendatory list No. 1 of selection of Jan. 5th, 1884, by said Co. is hereby held for cancellation as to the above-described tract of land. The usual time, sixty days after notice, will be allowed the company within which to appeal to the Hon. Sec'y of the Interior.

Should this decision become final Stone will be permitted to complete his entry and filing. You will advise him of this action.

At the proper time you will make due report as to action taken in the premises.

Mess. Britton & Gray, the resident att'ys for said Co., will be advised hereof by this office.

Very respectfully, S. W. LAMOREUX, *Comm.*

18 Vol. 22, 1,000.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May* 20, 1896.

NORTHERN PACIFIC R. R. Co.
vs.
DIMON B. STONE.

Commissioner of the General Land Office.

SIR: The land involved in this case is the N. E. ¼ of sec. 3, tp. 13 N., R. 42 E., in the land district of Walla Walla, Washington,

and lies within the indemnity limits of the grant to the Northern Pacific Railroad Company. It was selected by the company on January 5, 1884, and on June 30, 1884, Dimon B. Stone offered a pre-emption filing for the same land, which, upon being rejected by the local officers for conflict with the company's grant, a hearing was ordered to determine the status of the land at the date of the selection.

The company has appealed from the decision of your office affirming that of the register & receiver, but the undisputed facts disclosed at the hearing and set out in the decision appealed from so fully support the conclusion therein reached that discussion is deemed unnecessary, and the same is affirmed.

The papers transmitted with your office letter "F" of August 26, 1895, are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

19 XVIII.

That the said decisions of the register & receiver and of said Commissioner of the General Land Office and the Secretary of the Interior were made and rendered by them and each of them under misapprehension and mistake of law, and the said decisions and each of them are contrary to the law.

XIX.

That under the rules and practice of the Department of the Interior the said decision of the Secretary of the Interior finally closed and determined the said controversy as to the said tract of land in said department, and the parties thereto were notified thereof, and that said contest was closed on July 10, 1896.

That thereafter, to wit, on the — day of ——, 189–, the defendant made what purported to be final proof, and there was issued to him what purported to be final receipt of and for said land in said district land office, in which said receipt it was recited that said defendant was entitled to a patent for said land from the United States, and thereafter, to wit, on the — day of ——, 1897, a patent of the United States purporting to convey title to said premises, to wit, the northeast quarter of section three, in township thirteen north of range forty-two east, Willamette meridian, in Garfield county, Washington, in fee-simple to said defendant, was issued to him, the said defendant.

XX.

Plaintiff avers that by reason of the premises said United States district land officers, said Commissioner of the General Land Office, and said Secretary of the Interior were wholly without jurisdiction to consider the said application of said defendant to make pre-emption entry of said land, for the reason that said land was not

20 public land of the United States and was not subject to homestead entry, but at the time when said defendant made application to enter said land the same was withdrawn, and that said decisions allowing said defendant to make pre emption entry of said

land were void, and said entry of said defendant was and is void and of no effect.

XXI.

That by reason of the foregoing facts said railroad company became and was the owner in fee-simple of said premises hereinbefore first described and entitled to the legal title thereof and thereto and to the issuance of a patent therefor by the United States of America, which was wrongfully and unlawfully withheld, as aforesaid, and the said patent so issued to defendant, or, if not issued, which will hereafter be issued to him, constitutes the defendant a trustee, who holds the legal title for the benefit of the plaintiff herein, and casts a cloud upon the title of plaintiff herein, and the defendant wrongfully and unlawfully withholds the possession of said premises, to wit, the northeast quarter of section three, in township thirteen north of range forty-two east, Willamette meridian, in Garfield county, Washington, from plaintiff, to the immediate and exclusive possession of which and the whole thereof plaintiff is entitled.

XXII.

That —— Stone, who was the wife of defendant D. B. Stone, died intestate, in Garfield county, State of Washington, on the — day of ——, 1898 (and no administrator or administratrix has been appointed), leaving as her heirs the defendants herein, who, excepting defendant D. B. Stone, are her children and the only children surviving her and the only children which she has or ever had; that the premises and property herein described, if any right or interest was ever acquired by defendant D. B. Stone, was acquired after his marriage with the said deceased; that some of said children
21 of said deceased are of age and some are minors; that the names of those who are minors are Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone; that the said Ammvillis Allen and Sylvia S. Jenks are married; that said children and defendants other than D. B. Stone have no other rights except as heirs of the said deceased.

That at divers & sundry times pl'ff has demanded possession of & for said premises from defendants, & especially of D. B. Stone.

Wherefore plaintiff prays judgment:

1. That guardian or guardians *ad litem* be appointed for the minor defendants herein.

2. That defendants may be required to set forth the nature of their, his, or her claim, and that all adverse claims of defendants or either of them may be determined by a decree of this court.

3. That defdants be declared trustees for the use and benefit of plaintiff; that by said decree it be declared and adjudged that defendants or either of them have no right, title, interest, or estate whatever in and to the said lands and premises or any part thereof; that the title of said plaintiff be decreed good, valid, and a fee-simple title, and that defendants be required to execute and deliver to plaintiff deed or deeds so as to vest in plaintiff a complete record title in and to said premises; that any and all pretended

claims of defendants or either of them be held for naught and cancelled.

4. That the defendants and each of them be forever enjoined and debarred from asserting any claim whatever in or to said lands or premises or any part thereof adverse to plaintiff; that plaintiff have judgment quieting title against defendants and each of them, and removing the cloud from plaintiff's title created by the pretended claim or claims of defendants or either of them; that plaintiff be adjudged entitled to immediate and exclusive possession of said premises and the whole and every part thereof and be put into possession thereof by order of this court.

22

5. That plaintiff have such other or further relief as to this honorable court shall seem meet and proper and agreeable to equity.

6. That plaintiff have and recover of and from defendants his costs and disbursements herein.

STOLL, STEPHENS, BUNN & MACDONALD.
Attorneys for Plaintiff.

STATE OF WASHINGTON, }
County of Spokane, } ss:

H. M. Stephens, being first duly sworn, upon oath deposes and says that he is one of the attorneys for the above-named plaintiff in the above-entitled action, and makes this verification for and on behalf of said plaintiff, for the reason that said plaintiff is not now within either the county of Spokane or the county of Garfield, State of Washington; that affiant knows the contents of the foregoing amended complaint and the same is true, as he verily believes.

H. M. STEPHENS.

Subscribed and sworn to before me this 5th day of February, 1898.

E. T. WHITE,
Notary Public for the State of Washington,
Residing at Spokane, Washington.

Indorsed: Due service of the within-amended complaint by receipt of a true copy thereof admitted this 7th Feb'y, 1898. Ben. F. Tweedy, att'y for def't. Filed Feb'y 7th, 1898. A. E. Dickson, Co. clerk.

23 In the Superior Court of the State of Washington — & for Garfield County.

J. M. MOORE, Plaintiff,
vs.
D. B. STONE & AMMVILLIS ALLEN, ALMA MAY Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, Defendants. } Demurrer.

Comes now the said defendants, by their said attorneys, Gose & Kuykendall and Tweedy & Jewett, and demurs to the plaintiff's complaint on file herein, for the reason that the same does not state facts sufficient to constitute a cause of action.

GOSE & KUYKENDALL AND
TWEEDY & JEWETT,
By G. W. JEWETT,
Defendants' Attorneys.

P. O. address: Pomeroy, Washington.

Filed April 18, '98.
A. E. DICKSON, *Co. Clerk.*

24 In the Superior Court of the State of Washington in & for the County of Garfield.

J. M. MOORE, Pl'tff, } No. 625. Order Appointing Guardian *ad Litem*.
vs.
D. B. STONE ET AL., Def'ts.

On motion of plaintiff, & the court being fully advised in the premises, it appearing that defendants Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone are minors, & have been duly personally served with summons & complaint, and that the residue of the defendants are of and over age, and said minors or either of them not having applied for the appointment of a guardian *ad litem* herein:

It is therefore ordered that M. F. Gose, a member of this bar and a suitable and competent person, be, and he is hereby, appointed guardian *ad litem* herein of said minor defendants & of each of them, to represent & protect the interests of said minors.

Done, in open court, this June 6th, 1898.

THOS. H. BRENTS, *Judge.*

(Indorsed:) Filed June 6, '98. A. E. Dickson, Co. clerk.

25 In the Superior Court of the State of Washington in and for Garfield County.

J. M. MOORE, Pl'tff,
v.
D. B. STONE ET AL., Def'ts. } No. 625. Demurrer of Guardian *ad Litem* of the Minor Defendants.

Comes now M. F. Gose, guardian *ad litem* of & for defendants Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, and demurs to the amended complaint of plaintiff herein, for the reason that said amended complaint does not state facts sufficient to constitute a cause of action against said minor defendants or either of them.

M. F. GOSE,
Guardian ad Litem of Defendants Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone.

26 In the Superior Court of the State of Washington for Garfield County.

J. M. MOORE, Plaintiff,
against
D. B. STONE ET AL., Defendants. } No. 625.

On the — day of June, 1898, the demurrer of the defendants to the amended complaint was argued and submitted for the plaintiff by Ben. F. Tweedy and Mack F. Gose, Esquires, of counsel for the defendants, and by H. M. Stephens and James B. Kerr, Esquires, of counsel for the plaintiff, and was taken under advisement by the court; and now, on this 10th day of August, 1898, the court, being fully advised in the premises, sustains said demurrer, said plaintiff, by his counsel, duly excepting thereto.

THOS. H. BRENTS, *Judge.*

(Indorsed:) Filed Aug. 15, '98. A. E. Dickson, Co. clerk.

27 In the Superior Court of the State of Washington for Garfield County.

J. M. MOORE, Plaintiff,
vs.
D. B. STONE, AMMVILLIS ALLEN, ALMA MAY STONE, EDWIN R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, Defendants. } Order.

The demurrer of the defendants to the amended complaint of plaintiff herein came on regularly for hearing and determination on the — day of ——, 1898, and plaintiff and defendants appearing by their respective attorneys, and after argument, and the court being fully advised in the premises, it is—

Ordered that said demurrer be, and the same was, sustained; which order has been heretofore entered by the court; whereupon

plaintiff announces that he desires to stand upon his amended complaint and declined to further plead herein; whereupon the defendants moved the court for an order dismissing the action of plaintiff herein; which motion was granted by the court. Plaintiff excepted to the order and ruling of the court sustaining the demurrer, and also to the order and ruling of the court sustaining the motion of the defendants to dismiss the above-entitled action; which objections were, and they are hereby, allowed by the court.

Wherefore it is ordered and adjudged by the court that the above-entitled action be, and the same is hereby, dismissed at plaintiff's cost, and that defendants do have and recover of and from the plaintiff their costs and disbursements herein, taxed at — dollars: to all of which the plaintiff excepts and exception is allowed.

Done in open court this 18th day of July, 1898.

28 THOS. H. BRENTS, *Judge.*

(Indorsed.) Filed Aug. 27, '98. A. E. Dickson, Co. clerk.

29 In the Superior Court of the State of Washington for Garfield County.

J. M. MOORE, Plaintiff,
v.
D. B. STONE, AMMVILLIS ALLEN, ALMA MAY STONE, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, Defendants. } Notice of Appeal.

To the above named defendants, D. B. Stone, Ammvillis Allen, Alma May Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, and to M. F. Gose, guardian *ad litem* of defendants Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, and to Messrs. Tweedy & Jewett and Gose & Kuykendall, your attorneys:

You and each of you are hereby notified that the above-named plaintiff does hereby appeal to the supreme court of the State of Washington from that certain order and final judgment rendered and entered herein on the 27th day of August, 1898, which order and final judgment is in favor of defendants and against plaintiff, and which said order and final judgment is one dismissing the action of plaintiff herein and for costs in favor of defendants and against plaintiff, and from the whole and every part of said order and final judgment.

Dated this 27th day of August, 1898.

STEPHENS & BUNN,
Attorneys for Plaintiff.

(Indorsed:) Due service of the within notice by receipt of a true copy thereof admitted this 29th day of August, 1898. Tweedy &

Jewett, att'ys for def't-. Due service of the within notice of appeal admitted and copy rec'd Aug. 29, '98. M. F. Gose, guardian *ad litem* for Orson Emer Stone, Harland Clifford Stone, and Orley Otis Stone. Filed Aug. 29, '98. A. E. Dickson, Co. clerk.

30 In the Superior Court of the State of Washington for Garfield County.

J. M. MOORE, Plaintiff,
v.
D. B. STONE, AMMVILLIS ALLEN, ALMA MAY Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, Defendants. } Bond on Appeal.

Know all men by these presents that the undersigned, for and on behalf of the above-named plaintiff, does hereby bind himself, his heirs, executors, and administrators, unto the above-named defendants in the sum of two hundred dollars ($200.00).

The condition of the above obligation is such that whereas the above-named plaintiff has appealed to the supreme court of the State of Washington from that certain order and final judgment made and entered in the above-entitled action on the 27th day of August, 1898, which said order and final judgment is in favor of defendants and against said plaintiff:

Now, therefore, if the said plaintiff (appellant) shall and will pay all costs and damages that may be awarded against him on the said appeal or on the dismissal thereof, not exceeding two hundred dollars, then and in that event this obligation to become null and void; otherwise to be and remain in full force and effect.

Dated this 29th day of August, 1898.

F. H. MASON.

(Indorsed:) Filed Sept. 1, '98. A. E. Dickson, Co. clerk.

31 STATE OF WASHINGTON, }
County of Spokane, } ss:

F. H. Mason, being first duly sworn, upon oath deposes and says that he is the party who made and executed the above and foregoing bond for and on behalf of the above-named plaintiff and for the purpose of effecting and perfecting an appeal in the above-entitled action; that he is a resident of the county of Spokane, State of Washington, and is worth the sum of two hundred dollars over and above all debts and liabilities, in separate property within the State of Washington, exclusive of property exempt from execution.

F. H. MASON.

Subscribed and sworn to before me this 29th day of August, 1898.
[Seal of Notary Public.]

E. T. WHITE,
Notary Public in and for said County and State,
Residing at Spokane, Washington.

(Indorsed:) Filed Sept. 1, '98. A. E. Dickson, Co. clerk.

32 In the Superior Court of the State of Washington for Garfield Co.

J. M. MOORE, Plaintiff,
vs.
D. B. STONE, AMMVILLIS ALLEN, ALMA MAY Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, Defendants. } Substitution of Att'ys.

We hereby consent to the substitution of Stephens & Bunn as attorneys for the plaintiff in the above-entitled action in our place and stead, and hereby withdraw our appearance herein.

Dated at Spokane, Washington, this 27th day of August, 1898.

STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiff.

To the above-named defendants, D. B. Stone, Ammvillis Allen, Alma May Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, and to M. F. Gose, guardian *ad litem* of defendants Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, and to Messrs. Tweedy & Jewett and Gose & Kuykendall, your attorneys:

You will please take notice that Stephens & Bunn, the undersigned, have been substituted as attorneys for the plaintiff in the above-entitled cause in place of Messrs. Stoll, Stephens, Bunn & Macdonald, their consent being above set forth.

STEPHENS & BUNN,
Attorneys for Plaintiff.

33 STATE OF WASHINGTON, } ss:
County of Spokane, }

E. T. White, being first duly sworn, upon oath deposes and says that he is over the age of twenty-one years; that Messrs. Stephens & Bunn, attorneys for the plaintiff in the above-entitled action, have their offices in the city of Spokane, State of Washington; that Messrs. Tweedy & Jewett are attorneys for the above-named defendant and have their offices in the city of Pomeroy, Washington; that Mr. M. F. Gose is the guardian *ad litem* of defendants Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, minors, and has his office and resides in the said city of Pomeroy, Washington; that on this 27th day of August, 1898, affiant deposited in the United States post-office at the said city of Spokane, Washington, a full, true, and correct copy of the above and foregoing substitution of attorneys, enclosed in a sealed envelope, postage prepaid, and addressed to said Messrs. Tweedy & Jewett, attorneys-at-law, at Pomeroy, Washington, and also a full, true, and correct copy of said substitution of attorneys, enclosed in a sealed envelope, postage prepaid, and addressed to said M. F. Gose, at said Pomeroy, Washington; that there is a daily mail service between the said city

of Spokane, Washington, and the said city of Pomeroy, Washington.

E. T. WHITE.

Subscribed and sworn to before me this 27th day of August, 1898.

H. M. STEPHENS.
Notary Public for the State of Washington, Residing at Spokane, Washington.

34 J. M. MOORE, Plaintiff, *vs.* D. B. STONE ET AL., Defendants.

STATE OF WASHINGTON, *County of Garfield,* } *ss:*

I, A. E. Dickson, county clerk and clerk of the superior court in and for Garfield county, the State of Washington, do hereby certify that the foregoing and annexed are true, full, and correct copies of the amended complaint, demurrer, order appointing guardian *ad litem*, demurrer of guardian *ad litem* of the minor defendants, order on demurrer, order of dismissal, notice of appeal and bond on appeal, and substitute of att'ys, as the same now appear of record in the files of said court in foregoing entitled action, now in my care, custody, and keeping.

In witness whereof I have hereunto set my hand and affixed the seal — said court this 10th day of September, 1898.

A. E. DICKSON,
[SEAL.] *County Clerk and Clerk of the Superior Court in and for said County and State.*

(Indorsed:) Filed Oct. 7, 1898. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

35 J. M. MOORE, Appellant, *vs.* D. B. STONE ET AL., Respondents. No. 3124.

Filed Dec. 5th, 1898.

Per Curiam:

This case falls within the rule announced by this court in Moore *vs.* Cormode and is accordingly affirmed.

36 In the Supreme Court, State of Washington.

SATURDAY, *January 14th*, 1899.

J. M. MOORE, Appellant, *vs.* D. B. STONE ET AL., Respondents. No. 3124. Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Garfield county and

upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion, in writing, it is now, on this 14th day of January, A. D. 1899, on motion of M. F. Gose, Esquire, of counsel of respondent, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed with costs, and that the said D. B. Stone *et al.* have and recover of and from the said J. M. Moore and from F. H. Mason, surety, the costs of this action, taxed and allowed at twenty-five dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with this opinion.

37 STATE OF WASHINGTON:

In the Supreme Court.

J. M. MOORE, Plaintiff in Error,
vs.
D. B. STONE, AMMVILLIS ALLEN, ALMA MAY STONE, EDWIN R. STONE, LUCY MYRTLE STONE, SYLVIA S. JENKS, WARREN L. STONE, ORSON EMER STONE, HARLAND CLIFFORD STONE, ORLIE OTIS STONE, and M. F. GOSE, as Guardian *ad Litem* for the Above-named Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, Defendants in Error.

Now comes the above-named J. M. Moore, plaintiff in error, and prays that a writ of error in the above-entitled cause may issue to the said supreme court of the State of Washington to review a certain judgment entered in said court on the 14th day of January, 1899, in favor of said D. B. Stone, Ammvillis Allen, Alma May Stone, Edwin R Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, Orlie Otis Stone, and M. F. Gose, as guardian *ad litem* for the above-named Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, defendants in error, and against the said J. M. Moore, plaintiff in error, and dismissing the complaint of the plaintiff in error, J. M. Moore, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of Washington, to the great damage of said plaintiff in error; all of which will more in detail appear from the assignment of errors which is filed with this petition.

J. M. MOORE,
Plaintiff in Error,
By C. W. BUNN,
JAMES B. KERR,
H. M. STEPHENS,
His Attorneys.

Dated February 23rd, 1899.

(Indorsed:) Filed Mar. 2, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

38 STATE OF WASHINGTON:

In the Supreme Court.

J. M. MOORE, Plaintiff in Error,

vs.

D. B. STONE, AMMVILLIS ALLEN, ALMA MAY STONE, EDWIN R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, Orlie Otis Stone, and M. F. Gose, as Guardian *ad Litem* for the Above-named Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, Defendants in Error.

Now comes the above-named plaintiff in error, J. M. Moore, by C. W. Bunn, H. M. Stephens, and James B. Kerr, his attorneys, and assigns the following errors in the judgment of this court herein:

I.

The court erred in its judgment that the complaint of the plaintiff in error be dismissed.

II.

The court erred in its judgment sustaining the demurrers of the defendants in error to the complaint of the plaintiff in error herein.

III.

The court erred in its judgment wherein and whereby it decided that the plaintiff in error was not the owner of the land in controversy and was not entitled to recover possession thereof.

IV.

The court erred in its judgment wherein and whereby it decided that the plaintiff in error was not entitled to judgment canceling the patent issued to the defendant in error D. B. Stone and adjudging plaintiff in error to be the owner of the premises in con-
39 troversy.

V.

The court erred in its judgment wherein and whereby it decided that the patent issued to the defendant in error D. B. Stone conveyed to him the legal and equitable title to the premises in controversy.

VI.

The court erred in failing to hold and decide that the plaintiff in error was the owner and entitled to the possession of the premises in controversy under and by virtue of the conveyance to said plaintiff in error from the Northern Pacific Railroad Company.

VII.

The court erred in failing to hold and decide that the Northern Pacific Railroad Company became the owner of the premises in

controversy by virtue of the act of Congress approved July 2, 1864, granting lands to aid in the construction of the Northern Pacific railroad.

VIII.

The court erred in failing to hold that the Northern Pacific Railroad Company became the owner of the premises in controversy by virtue of its selection thereof under said act of Congress of July 2, 1864.

IX.

The court erred in failing to hold and decide that the premises in controversy were public land of the United States, free from pre-emption or other claims or rights, and subject to the grant to said Northern Pacific Railroad Company under said act of Congress of July 2, 1864, at the date of selection, to wit, December 12th, 1883.

X.

The court erred in failing to hold that the selection of the premises in controversy by the Northern Pacific Railroad Company on December 12th, 1883, was in compliance with said act of July 2, 1864, and the directions of the Secretary of the Interior, and operated to appropriate said premises to said Northern Pacific Railroad Company under said grant.

XI.

The court erred in holding and deciding that the occupancy of the premises in controversy by the defendant in error D. B. Stone on the date of the selection thereof by the Northern Pacific Railroad Company constituted such a claim thereto as prevented the attachment of the grant to said Northern Pacific Railroad Company upon selection.

XII.

The court erred in failing to hold and decide that the premises in controversy were appropriated to and passed to the Northern Pacific Railroad Company upon the definite location of its road under said act of July 2, 1864, for the reason that all of the lands in the indemnity limits were insufficient to satisfy the losses from the place limits of its said grant.

XIII.

The court erred in failing to hold and decide that the premises in controversy were withdrawn from sale, homestead, and pre-emption entry by virtue of the provisions of said act of July 2, 1864, from and after February 21, 1872, when the general route of said Northern Pacific railroad was fixed.

XIV.

The court erred in failing to hold and decide that the premises in controversy were withdrawn from sale, homestead, and pre-emption entry by virtue of the provisions of said act of July 2, 1864 from

and after October 4, 1880, when the line of said Northern Pacific railroad was definitely located.

XV.

The court erred in failing to hold and decide that the
41 premises in controversy were withdrawn from sale, homestead, and pre-emption entry from and after November 13, 1880, by virtue of the withdrawal thereof by the Commissioner of the General Land Office.

XVI.

The court erred in failing to hold and decide that the Land Department of the United States committed an error or law in awarding the premises in controversy to the defendant in error, D. B. Stone, and allowing his homestead entry thereof, and in cancelling the selection of the Northern Pacific Railroad Company.

XVII.

The court erred in holding that the patent issued to the defendant in error D. B. Stone concluded and determined the rights of the parties herein.

J. M. MOORE,
By C. W. BUNN,
JAMES B. KERR,
H. M. STEPHENS,
His Attorneys.

Dated Feb'y 23rd, 1899.

(Indorsed:) Filed Mar. 2, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

42 Know all men by these presents that we, Howell W. Peel and E. L. Rutter, of the city of Spokane, county of Spokane, State of Washington, are firmly bound unto D. B. Stone, Ammvillis Allen, Alma May Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, Orlie Otis Stone, and M. F. Gose, as guardian *ad litem* for the above-named Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, of the county of Garfield, in the State of Washington, in the full and just sum of two hundred and fifty (250) dollars, to be paid to the said D. B. Stone, Ammvillis Allen, Alma May Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, Orlie Otis Stone, and M. F. Gose, as guardian *ad litem* for the above-named Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, their heirs, representatives, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, in the supreme court of the State of Washington, in a suit pending in said court between J. M. Moore, plaintiff, and D. B. Stone, Ammvillis Allen, Alma May Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, Orlie Otis Stone, and M. F. Gose, as guardian *ad litem* for the above-named Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, defendants, judgment was rendered against said plaintiff, J. M. Moore, and the said plaintiff having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid cause, and the citation directed to the said D. B.
43 Stone, Ammvillis Allen, Alma May Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, Orlie Otis Stone, and M. F. Gose, as guardian *ad litem* for the above-named Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, defendants, citing and admonishing them and each of them to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, on or before the first day of May, 1899:

Now, the condition of the above obligation is such that if the said J. M. Moore shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation is void; otherwise to remain in full force and virtue.

HOWELL W. PEEL. [SEAL.]
R. L. RUTTER. [SEAL.]

Sealed and delivered in the presence of—
E. T. WHITE.
H. M. STEPHENS.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Howell L. Peel and R. L. Rutter, being first duly sworn, each for himself, and not one for the other, deposes and says:

That he is one of the parties who made and executed the above and foregoing bond for and on behalf of J. M. Moore, plaintiff in error in the cause mentioned therein, and for the purpose of effecting and perfecting a writ of error therein; that he is a resident of the county of Spokane, State of Washington, and is worth the sum of two hundred and fifty (250) dollars over and above all debts and liabilities, in separate property within the State of Wash-
44 ington, exclusive of property exempt from execution.

HOWELL W. PEEL.
R. L. RUTTER.

Subscribed and sworn to before me this 24th day of February, A. D. 1899.

E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

[SEAL.]

4—284.

The foregoing bond is approved as to form and sufficiency.

MERRITT J. GORDON,
Chief Justice of the Supreme Court of Washington.

(Indorsed:) Filed Mar. 2, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in a suit between J. M. Moore, plaintiff, and D. B. Stone, Ammvillis Allen, Alma May Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, Orlie Otis Stone, and M. F. Gose, as guardian *ad litem* for the above-named Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, defendants, wherein was drawn in question the validity of a statute or an authority exercised under the United States and the decision was against its validity, a manifest error hath intervened, to the great damage of the said J. M. Moore, as by his complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 2nd day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.

46 The above writ is hereby allowed.

MERRITT J. GORDON,
Chief Justice of the Supreme Court of Washington.

47 [Endorsed:] 3124. State of Washington. In supreme court. J. M. Moore, pl'ff in error, *vs.* D. B. Stone and others, defend-

ants in error. Writ of error. Filed Mar. 3, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy. C. W. Bunn, James B. Kerr, H. M. Stephens, attorneys for pl'ff in error.

48 United States of America to D. B. Stone, Ammvillis Allen, Alma May Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, Orlie Otis Stone, and M. F. Gose, as guardian *ad litem* for the above-named Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Washington, wherein J. M. Moore is plaintiff in error and you and each of you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Merritt J. Gordon, chief justice of the supreme court of the State of Washington, this second day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

MERRITT J. GORDON,
Chief Justice of the Supreme Court of Washington.

49 STATE OF WASHINGTON, } ss:
County of Garfield, }

S. S. Russell, being first duly sworn, upon oath deposes and says:

That he is the duly elected, qualified, and acting sheriff of Garfield county, State of Washington.

That he served the within citation upon the within-named defendants, D. B. Stone, Alma May Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, Orlie Otis Stone, and M. F. Gose, as guardian *ad litem* for the above-named Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, by delivering to & leaving with them and each of them, personally, a true copy of said citation, certified by affiant to be such true copy.

Affiant further certifies that he served the said citation upon the attorneys for the above-named defendants by delivering to and leaving with Messrs. Gose & Kuykendall a true copy of said citation, certified by affiant to be such.

Affiant further certifies that said service was made on all and each of said defendants and on said attorneys on the 9th day of March, A. D. 1899, within the county of Garfield, State of Washington, and that said parties are the defendants mentioned in said citation.

S. S. RUSSELL.

Subscribed and sworn to before me this 10th day of March, A. D. 1899.

{Seal of Ben. F. Tweedy, Notary Public, State of Washington. Commission expires Sept. 6, 1901.}

BEN. F. TWEEDY,
Notary Public in and for the State of Washington, Residing at Pomeroy, said State.

50 STATE OF WASHINGTON, } ss:
County of Spokane, }

John Culton, being first duly sworn, upon oath deposes and says that he is a citizen and resident of Whitman county, State of Washington, over the age of twenty-one years, competent to be a witness in the action mentioned in the foregoing citation, and a disinterested party; that he served said citation on the within-named Ammvillis Allen, in the county of Whitman, State of Washington, by delivering to and leaving with her, personally, a true copy of said citation, certified by affiant to be such true copy; which said service was so made upon said Ammvillis Allen upon the 16th day of March, A. D. 1899; that said Ammvillis Allen is one of the parties mentioned in the said citation, to whom said citation is directed.

JOHN CULTON.

Subscribed and sworn to before me this 16th day of March, A. D. 1899.

{Seal of G. W. Peddycord, Notary Public, State of Washington. Commission expires Feb. 10, 1900.}

G. W. PEDDYCORD,
Notary Public in and for the State of Washington, Residing at Palouse City, Whitman County, Washington.

51 [Endorsed:] 3124. State of Washington. In supreme court. J. M. Moore, pl'ff in error, *vs.* D. B. Stone and others, defendants in error. Citation. Filed Mar. 20, 1899. C. S. Reinhart, clerk. C. W. Bunn, James B. Kerr, H. M. Stephens, att'ys for pl'ff in error.

52 In the Supreme Court, State of Washington.

J. M. MOORE, Plaintiff,
v.
D. B. STONE, AMMVILLIS ALLEN, ALMA MAY Stone, Edwin R. Stone, Lucy Myrtle Stone, Sylvia S. Jenks, Warren L. Stone, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone, Defendants.

Certificate, Clerk of Supreme Court.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full,

true, and correct transcript of the record in the above-entitled cause, and that in pursuance of the writ of error filed herein I now transmit the same, together with the original writ of error, the original citation, and a copy of the bond on appeal and of the assignment of errors, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 14th day of April, 1899.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

[Ten-cent U. S. internal-revenue stamp.]

Endorsed on cover: File No., 17,394. Washington supreme court. Term No., 284. J. M. Moore, plaintiff in error, *vs.* D. B. Stone, Ammvillis Allen, Alma May Stone, *et al.* Filed May 4, 1899.

No. 284 48

FILED
APR 16 1900
JAMES H. McKENNEY,
Clerk

Brf. of Bunn & Kerr for P. E.

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 284.

Filed April 16, 1900.

J. M. MOORE,
Plaintiff in Error,

vs.

D. B. STONE, AMMVILLIS ALLEN, ALMA MAY STONE, EDWIN R. STONE, LUCY MYRTLE STONE, SYLVIA S. JENKS, WARREN L. STONE, CRSON EMER STONE, HARLAND CLIFFORD STONE, and ORLIE OTIS STONE,

ARGUMENT FOR PLANTIFF IN ERROR.

C. W. BUNN and
JAMES B. KERR,
Counsel for Plaintiff in Error.

700

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 284.

J. M. MOORE,

Plaintiff in Error,

vs.

D. B. STONE, AMMVILLIS ALLEN, ALMA MAY STONE, EDWIN R. STONE, LUCY MYRTLE STONE, SYLVIA S. JENKS, WARREN L. STONE, ORSON EMER STONE, HARLAND CLIFFORD STONE, and ORLIE OTIS STONE,

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ARGUMENT FOR PLANTIFF IN ERROR.

This case is before the court on a writ of error directed to the supreme court of Washington. The action was commenced in the superior court of Garfield county, Washington, to cancel a patent issued under the preemption law to the defendant Dimon B. Stone, purporting to convey the northeast quarter (N. E. $\frac{1}{4}$) of section three (3), township thirteen (13), range forty-two (42) east of the Willamette meridian, a tract of land situated within the indemnity limits of the Northern Pacific grant.

The title of the plaintiff is derived by purchase from the Northern Pacific Railroad Company under its grant by act of July 2, 1864, (13 Stat. 365).

The supreme court of Washington sustained a demurrer to the complaint and entered judgment dismissing the action. The complaint alleges that by the third section of the act of congress approved July 2, 1864, lands were granted to the Northern Pacific Railroad Company as follows:

"*And be it further enacted,* That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." (Transcript, p. 1).

It is then alleged that on October 4, 1880, the railroad company definitely located that portion of its road extending from the city of Spokane, Washington, to Wallula, Washington, by transmitting to the secretary of the interior a map of the definite location of that portion of its road, and that this map was, on October 4, 1880, approved by the secretary of the interior and by him caused to be filed in the office of the commissioner of the general land office (Transcript, p. 5). That upon definite location the land in controversy fell within the 40-50 mile or indemnity limits of the grant (Transcript, p. 6). That upon the filing of the map of definite location the commissioner of the general land office, acting under the directions of the secretary of the interior, withdrew from sale, homestead and preemption entry, all the odd-numbered sections situated within the indemnity limits opposite the portion of the line so located. The order of withdrawal was received at the district land office at Walla Walla on November 30, 1880 (Transcript, p. 6).

It is alleged that the land in controversy was, at the date of the grant, at the date of definite location and at the date of withdrawal, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights, and was, and is, non-mineral (Transcript, p. 6).

It is alleged that prior to the year 1885, the Northern Pacific Railroad Company definitely located the whole of its main and branch lines, and

that the same were constructed prior to the year 1888 and examined by commissioners and approved by the president of the United States, as provided by section 4 of the act of July 2, 1864 (Transcript, p. 7).

It is further alleged that at the respective dates of definite location of the various portions of said railroad, the total area of lands lost from the primary limits of the grant exceeded the total area of lands in the indemnity limits subject to selection (Transcript, pp. 7-8).

It is further alleged that on December 12, 1883, the Northern Pacific Railroad Company, under the direction of the secretary of the interior, selected the lands in controversy and filed its selection list in the district land office at Walla Walla, Washington, and paid the fees required by law; that thereafter, and on October 26, 1887, in compliance with certain directions of the secretary of the interior, issued subsequent to the selection, the railroad company specified the losses in lieu of which the lands in controversy had been selected. It is alleged that the lost lands so specified were within the primary limits of the grant and were excepted therefrom (Transcript, pp. 8-9).

It is further alleged that on July 2, 1895, the Northern Pacific Railroad Company, by warranty deed, conveyed to the plaintiff the lands described in the complaint (Transcript, p. 9).

It is alleged that on June 30, 1884, the defendant Dimon B. Stone presented a preemption declaratory statement for the land in controversy at the

district land office at Walla Walla, alleging settlement on the land April 25, 1882; that this application was rejected and, on appeal, the commissioner of the general land office ordered a hearing to determine the status of the land at the date of selection and the rights of the parties. The decision of the district land officers on this hearing was that by reason of the settlement of Stone at the date of selection, the selection should be canceled. This decision was rendered in April, 1891 (Transcript, pp. 9-10).

Upon appeal by the railroad company to the commissioner of the general land office, that officer, by decision rendered April 30, 1895, affirmed the decision of the local officers, and held that solely by reason of the occupancy of Stone at the date of selection, the land was excepted from the grant, although protected by the withdrawal order of November 30, 1880. The railroad company thereupon appealed to the secretary of the interior from the decision of the commissioner of the general land office, and the secretary affirmed the decision of the commissioner upon the grounds above stated. The decisions of the commissioner and of the secretary are set out at length in the complaint (Transcript, pp. 10-12).

It is further alleged that in accordance with the decision of the secretary of the interior, final proof was made by the defendant Dimon B. Stone, and that in the year 1897 a patent was issued purporting to convey title to the premises in question un-

der the preemption law to said Stone (Transcript, p. 12).

The complaint alleges that after the issuance of patent, the wife of the defendant Dimon B. Stone died intestate, leaving as her heirs, the defendants (other than Dimon B. Stone), named in the complaint, whose interest in the premises is claimed by inheritance of the community interest of the wife of Dimon B. Stone, under the laws of Washington (Transcript, p. 13).

The complaint alleges that the officers of the land department committed an error of law in cancelling the selection of the railroad company and issuing the patent to the defendant Stone, and it is prayed that the patent be canceled and that the defendants be decreed to hold in trust for the plaintiff any title acquired by virtue of the patent, and that the plaintiff be adjudged entitled to the possession of the premises.

To this complaint the defendants interposed a demurrer, specifying as a ground therefor that the complaint does not state facts sufficient to constitute a cause of action (Transcript, p. 15).

The supreme court of Washington sustained the demurrer, affirming the judgment of the superior court for Garfield county, dismissing the action. No opinion was filed in the case, the decision being rendered upon a memorandum referring to the opinion filed in Moore v. Carmode, which is No. 285, and heard in argument with this case (Transcript, p. 20).

ASSIGNMENT OF ERRORS.

Errors are duly assigned in the record (Transcript, pp. 22-24) but may be briefly stated, as follows:

I.

The court erred in sustaining the demurrer to the complaint and in entering judgment dismissing the action.

II.

The court erred in holding that the patent issued to Dimon B. Stone is conclusive of the rights of the parties.

III.

The court erred in holding that no rights were acquired by virtue of the selection of the premises under act of congress approved July 2, 1864.

IV.

The court erred in holding that the settlement of Dimon B. Stone excepted the land in controversy from the grant to the Northern Pacific Railroad Company.

V.

The court erred in holding that the withdrawal of the land in controversy was void.

VI.

The court erred in failing to hold that the title of plaintiff was initiated prior to the title of defendants.

VII.

The court erred in denying plaintiff's title to the land in controversy claimed under the act of congress approved July 2, 1864.

MERE OCCUPATION WAS INSUFFICIENT TO DEFEAT THE GRANT.

It appears from the decisions of the commissioner of the general land office and the secretary of the interior, set out at length in the complaint, that the selection of the railroad company was canceled upon the sole ground of the occupancy of the premises by Dimon B. Stone at the date of selection. It appears from these decisions that Stone settled on the land April 25, 1882, but made no application at the land office until June 30, 1884, more than two years after his settlement, and more than six months after the selection by the railroad company.

It is submitted that the law was settled by this court in *Northern Pacific Railroad Company v. Colburn,* 164 U. S. 383, that mere settlement without a filing or entry creates no claim within the meaning of the Northern Pacific grant.

In that case Colburn sued the Northern Pacific Company to recover a sum of money paid by him

as contract price on a tract of land sold to him by the company, alleging that the company had no title to the land and that it was excepted from the grant. The company answered, alleging that the land was within the primary limits of its grant and at the date of the grant and the date of definite location when its rights attached, the records of the land office showed no preemption, homestead or other claims or rights; but admitted that at the date of definite location one Kelly was occupying and cultivating the land, but that he had made no entry or filing in the local land office. The supreme court of the state (Montana) sustained the demurrer to the answer, on the ground that it appeared that the land department had held the tract to be excepted from the grant. Mr. Justice Brewer, delivering the opinion of the court, said:

"In this we think the learned court erred. The facts set up in the answer in reference to the land grant, the filing of the map of the line of general route and also that of definite location, the situation of the land and its freedom from record claims, were such as to prima facie vest a title in the company. It is true, it is also disclosed by the answer that one Kelly was in occupation, or at least cultivating the land at the time of the filing of the map of definite location, and the decision of the land department as to that fact undoubtedly concludes both parties. And if it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location unaccompanied by any filing of a claim in the land office, then or thereafter, excludes the tract from the operation of the land grant, the decision of the supreme court of Montana was right. But frequent decisions of this court have been to the effect that no preemption or homestead claim

attaches to a tract until an entry in the local land office. Thus in the case of *Kansas Pacific Railway v. Dunmeyer,* 113 U. S. 629, 644, Mr. Justice Miller, speaking for the court, said:

"'Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into a perfect title by future residence and cultivation.'

"This language was quoted and the decision reaffirmed in *Hastings & Dakota Railroad v. Whitney,* 132 U. S. 357; *Whitney v. Taylor,* 158 U. S. 85. In *Lansdale v. Daniels,* 100 U. S. 113, 116, it was ruled that 'such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that the settlement alone is not sufficient for that purpose.' See also *Maddux v. Burnham,* 156 U. S. 544. Now, in this case the allegations are that Kelly never made any entry in the local land office and the decision of the secretary of the interior is based simply on the fact of occupation and cultivation. And while the decision of that fact may be conclusive between the parties his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties and which is open to review in the courts."

And in conclusion said further: "For the reasons above indicated, because the decision of the land department was only on matters of fact and did not include the law of the case, and as such *facts so found were not of themselves sufficient to disturb the title of the railroad company,* the judgment is reversed and the case remanded to the su-

preme court of the state for further proceedings not inconsistent with this opinion."

Counsel for defendants urge with much earnestness that the question of the effect of mere occupancy was not presented in the Colburn case. The language of the opinion seems too plain to justify argument upon this contention, but it may be observed in reply that the suggestion finds a conclusive answer in the denial by the court of the motion to dismiss for the lack of a federal question. The answer of the railroad company to the complaint of Colburn set up facts showing the land was free and clear at definite location, admitting the occupancy of Kelly. Upon these facts the state court denied the title claimed by the company under the federal grant. This court held that the effect of Kelly's settlement presented a federal question and held further that the effect of the occupancy was not to defeat the grant.

And this is the construction of the opinion upon which the interior department has acted since the decision was announced.

Wight v. Central Pacific R. R. Co., 27 L. D. 182; *Central Pacific R. R. Co. v. Hunsaker*, 27 L. D. 297; *Union Pacific R. R. Co. v. Grant*, 28 L. D. 18; *Union Pacific R. R. Co. v. Fisher*, 28 L. D. 75, 83.

The supreme court of Minnesota has also acted upon this plain construction of the Colburn case. *McHenry v. Nygaard*, 72 Minn. 2.

THE WITHDRAWAL.

It appears by the complaint that the officers of the land department committed a further error of law in cancelling the selection of the railroad company and allowing the entry of the defendant, for the reason that during the whole period of the defendant's occupation of the premises the land was withdrawn from homestead and preemption entry.

If the lands were withdrawn up to the time of the selection by the railroad company, no rights could be acquired under the public land laws which would defeat the selection. Sections 2257 and 2258 of the Revised Statutes of the United States provide what lands shall be subject to the right of preemption, and what lands may not be acquired in this manner. These sections are as follows:

Section 2257: "All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of preemption, under the conditions, restrictions, and stipulations provided by law."

Section 2258: "The following classes of lands, unless otherwise especially provided for by law, shall not be subject to the rights of preemption, to-wit:

First: *Lands included in any reservation by any treaty, law, or proclamation of the president, for any purpose.*

Second: Lands included within the limits of any incorporated town, or selected as the site of a city or town.

Third: Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

Fourth: Lands on which are situated any known salines or mines."

Lands withdrawn from entry by order of the commissioner of the general land office are lands included in a reservation by "proclamation of the president" and fall within the first exception to section 2258 supra. *Wolsey v. Chapman*, 101 U. S. 755, 769.

It is well settled that where the executive officers of the government attempt to dispose of lands under the preemption law which fall within these exceptions, they act beyond their jurisdiction and their acts are void, and a patent issued upon an entry of land not subject to the jurisdiction of the land department does not pass the legal title and such a patent may be challenged in an action at law. This was the conclusion reached in *Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321.

This was an action of ejectment brought to recover possession of certain islands in the Mississippi river and within the corporate limits of the city of Minneapolis. The plaintiff relied upon a patent of the United States, purporting to convey

the land in question, based upon a soldier's additional homestead entry. The patent was dated June 13, 1884, and the plaintiff's right was initiated March 27, 1883, on which latter date he applied to enter the land in question. The land department allowed the entry and issued patent, and it was insisted at the trial, upon the part of the plaintiff, that the determination by the land department that the land in question was subject to entry at the date when the patentee's right was initiated was conclusive. The court conceded that where the patentability of public lands depends upon questions of fact which are committed to the consideration and determination of the land department, such determination is final, as, for instance, the determination by the department that a certain tract is swamp land or saline land or mineral land. The court says, however:

"But it is also equally true that when, by act of congress, a tract of land has been reserved from homestead and preemption or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in patent, transfer no title and may be challenged in an action at law. In other words, the action of the land department cannot over-ride the expressed will of congress, or convey away public land in disregard or defiance thereof."

The court therefore held that the patent was void and the plaintiff could not recover.

It follows, therefore, in the case at bar that if the land in controversy was withdrawn up to the date of the selection by the railroad company, and

during the whole period of the defendant's settlement, and when the defendant tendered his preemption declaratory statement, neither the occupation of the defendant, nor his filing, made after selection, could operate to defeat the grant.

But it is contended by the defendants that the order of the commissioner of the general land office of November 30, 1880, was void and ineffective to reserve the land from preemption. This was the view taken by the officers of the land department.

Before considering the question of the authority of the commissioner of the general land office to order a withdrawal of indemnity lands for the benefit of the Northern Pacific Railroad Company, it will be proper to consider generally the authority of the land department over the public domain and the authority of its officers to withdraw from the operation of the general land laws of the United States lands otherwise open to acquisition under those laws.

The question was first squarely presented to this court in *Wolcott vs. Des Moines Co.*, 5 Wall. 687. In this case the following facts appeared:

By act of congress, August 8, 1846, there was granted to the then territory of Iowa:

"For the purpose of aiding said territory *to improve the navigation of the Des Moines river from its mouth to Raccoon Fork*, so called, in said territory, one equal moiety in alternate sections, of the public lands, in a strip five miles in width on each side of said river."

It appeared that the Des Moines river flows from the northern boundary of Iowa and empties into

the Mississippi river at the southeast corner of the state, and receives the waters of the Raccoon Fork about the middle of the state.

The extent of the land grant under this act was the subject of continuous conflict of opinion. For a time it was held by the officers of the land department that the grant extended the full length of the Des Moines river in the territory, and then that it extended only to the mouth of the Raccoon Fork. The courts were also divided upon the question until the latter construction was finally placed upon the act by this court in *Railroad Company vs. Litchfield,* 23 Howard, 66.

By the terms of the grant, the lands inuring to the territory were to be selected subject to the approval of the secretary of the treasury and, under the construction of the act that the grant extended above the Raccoon Fork, thousands of acres so situated were patented under the grant and all of the odd numbered sections within five miles of the river above Raccoon Fork were withdrawn. Then came the decision by this court, holding that the grant did not extend above Raccoon Fork.

The validity of the executive order of withdrawal of the odd numbered sections above the Fork was presented in this wise: May 15, 1856, congress passed an act granting to the state of Iowa to aid in the construction of certain specified railroads, every alternate section (designated by odd numbers) for six sections in width on each side of said roads, with the following proviso:

"That any and all lands heretofore reserved to the United States by any act of congress, or *in any other manner by competent authority, for the purpose of aiding in any objects of internal improvement, or for any purpose whatsoever, be, and* the same is hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands. * * * * *"*

It was contended that this grant to the state for the benefit of the railroads passed title to the lands covered by the executive withdrawal above Raccoon Fork. It was admitted that these lands passed unless excluded by the proviso. The court sustained the validity of the withdrawal, and said:

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory; as we have seen they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the president and cabinet; beside, if this power was not competent, *which we think it was* ever since the establishment of the land department, and which has ben exercised down to the present time, the grant of the 8th of August, 1846, *carried along with it by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated.* Hence immediately upon a grant being made by congress for any of these public purposes to a state, notice is given by the commissioner of the land office to the registers and receivers to stop all sales either public or by private entry. Such no-

tice was given the same day the grant was made in 1856 for the benefit of these railroads. That there was a dispute existing as to the extent of the grant in 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

To the same effect is *Wolsey vs. Chapman,* 101 U. S., 755.

The precise question here presented of a patent issued upon an attempted pre-emption of land covered by an executive withdrawal was considered in *Riley vs. Welles,* 154 U. S., 578.

In that case the same withdrawal as that considered in the two cases last above cited was before the court and it appeared that the defendant had applied to enter the land in controversy under the pre-emption law and that a patent had issued to him. The court held the allowance of the entry and the issuance of the patent to be acts done in violation of law. See also *Wood vs. Beach,* 156 U. S., 359; *Spencer vs. McDougal,* 159 U. S., 62; *Musser-Sauntry, Etc., Co. vs. Northern Pacific Rd. Co.,* 168 U. S., 604.

In the case at bar the decisions of the commissioner of the general land office, and of the secretary of the interior, allowing defendant's entry and holding the withdrawal of the indemnity lands upon definite location to be void are based upon the previous decisions of the secretary in the cases of *Northern Pacific Railroad Company vs. Guilford Miller,* 7 Land Decisions 100 and *Jennie L.*

Davis vs. Northern Pacific Railroad Company, 19 Land Decisions 87.

In his decision in the Guilford Miller and Davis cases the secretary questions the general authority of the executive officers of the government to make orders of withdrawal, the decisions of this court on the subject being passed over without mention. This question, however, must be considered as settled.

The secretary finally concludes in these cases that the order withdrawing from the operation of the general land laws lands in the indemnity belt of the Northern Pacific grant was void and without effect to reserve these lands from pre-emption and bases his conclusions on two grounds:

Firsts That the legislative withdrawal under the provisions of section 6, the act of July 2, 1864, of lands within forty miles of the line of the road, upon filing of the map of general route, was intended by congress to be exclusive of any authority in the land department to withdraw lands in the indemnity belt after definite location.

Second: That section 6 contains in express terms a prohibition against the withdrawal of indemnity lands by executive authority.

IS THE LEGISLATIVE WITHDRAWAL EXCLUSIVE?

The language of the sixth section of the granting act, operating to effect a preliminary withdrawal of all odd numbered sections of land within forty miles of the line of general route, is passed on in

Buttz vs. Northern Pacific Railroad Company, 119 U S. 55, as follows:

"The sixth section declares that after the general route shall be fixed, the president shall cause the land to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road and that the odd sections granted shall not be liable to sale, entry or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith and information thereof given in the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

And immediately following, in the same opinion, the court declares the purpose of this preliminary legislative withdrawal:

"The object of the law in this particular is plain, it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is by virtue of these provisions, so construed by this court, that the secretary of the interior concludes that it was the intention of congress that no withdrawal of indemnity lands should be made after the definite location of the road. He says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority and that its action on that behalf is intended to be exhaustive." (19 L. D. p. 89).

The secretary loses sight not only of the particular purposes for which this withdrawal on general route was provided, but of the intent of the whole act as apparent from its liberal terms and also a consideration of the circumstances under which the grant must be adjusted and which congress must have anticipated.

The preliminary withdrawal was for the purpose of securing the company between the time of filing its map of general route and its map of definite location. It was, of course, in contemplation that the general route of the road would be located within a comparatively short time after the passage of the granting act, but that it would require a much longer period to complete the explorations and accurate surveys necessary to a final definite location of the line. This in fact, turned out to be the case, for, although the maps of general route were filed in 1870, 1872 and 1873, the final maps of definite location were not filed until 1884. The preliminary withdrawal of forty miles on each side of the line of general route provided by congress to remain in force up to the time of definite location, was amply sufficient to substantially secure the rights of the company during that period. The line of the road being only approximately determined by the map of general route, lands in the indemnity belt not then ascertained as such would have a speculative value, at the most, very remote, and the rush of settlers to appropriate these lands, induced by the prospect of a railroad and the consequent development of the country, could not have been

looked for until the date of the definite location, when, for the first time, their proximity to the railroad would be assured.

It is submitted that this preliminary legislative withdrawal, instead of evidencing an intention on the part of congress that this exercise of the power of withdrawal should be exclusive, shows a disposition to protect the company in its full rights under the grant. As before stated, the withdrawal on general route was ample to protect the company up to the time of the definite location of its line, when its present grant of lands in place took effect and the limits of its indemnity belt became fixed. When this point was reached the function of the withdrawal on general route was fulfilled and at the same time by the terms of the grant, the right of selection of indemnity arose, the direction of which was expressly committed to the secretary of the interior. It is important to observe that without the withdrawal, the validity of which is here in issue, the right of selection would have been a barren right. By the act of June 2, 1862 (12 Stat. 413), the right of pre-emption was extended to all unsurveyed lands as well as surveyed lands, and, but for the executive withdrawal, the entire indemnity belt of the company's grant would have been subject to appropriation for a long period of time during which the company could have made no selection. The right of selection by the terms of the act creating it, was limited to odd numbered sections and until the indemnity lands were sur-

veyed, the odd numbered sections must remain unascertained.

It seems plain that no intention on the part of congress to curtail the powers of the executive in respect to this particular grant, exercised without question in a score of other cases, can be predicated on the provision of section six creating a legislative withdrawal from the location of the general route to the time of definite location. Substantial, and indeed conclusive, evidence of this view is found in the joint resolution of May 31, 1870 (10 Stat. 378), amendatory of and supplemental to the original granting act of July 2, 1864. By the joint resolution of 1870, the company was given the right in any state or territory to select odd numbered sections of land within ten miles beyond the limits prescribed in the act of 1864, in lieu of lands lost from the grant betwen the date of the act, July 2, 1864, and the date of definite location.

It is inconceivable that congress would create a right of selection by the act of 1864, which we have shown was a barren right, without the usual protection of an executive withdrawal, and six years later, by an act amendatory of the original granting act, give such plain evidence of its intention that the company should enjoy to the full extent the benefits conferred and intend that its first provision for indemnity should be a nullity.

In construing this grant in *Northern Pacific R. R. Co. vs. St. Paul, Minneapolis & Manitoba R. R. Co.*, 26 Fed. 551-554, Mr. Justice Brewer, sitting at

circuit, indicates the rule which must control its construction, that the conditions apparent to congress at the time of its passage must be kept in view. He says:

"While the grant is vast, the line to be constructed in order to earn it, is continental. The grant was made because congress believed the public good required the road, and, in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it is *fairer to presume that congress intended the freest bounty rather than to believe* that it burdened the grant with extra exceptions which when construction became feasible might largely deplete it of value."

Referring again to the case of *Wolcott vs. Des Moines River Co.*, 5 Wall. 687, it will be observed that the court says that the granting act there under consideration, *"carried along with it, by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated."*

A careful examination of the act in question (August 8, 1846, 9 Stat. 77) discloses that the provision referred to by the court was the requirement that the lands granted should be selected by an agent of the territory, "subject to the approval of the secretary of the treasury of the United States."

Place this provision side by side with the provision of section three of the Northern Pacific granting act, giving the right of indemnity, which is as follows: "Other lands shall be selected by said company in lieu thereof, *under the direction of the*

secretary of the interior," and the conclusion follows that the Northern Pacific grant carried with it not only the power but the duty to reserve the indemnity lands for the benefit of the company.

The proposition laid down by the secretary of the interior where he says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive," meets with a conclusive answer in the case of *Wood vs. Beach,* 156 U. S. 549.

In this case Wood attempted to acquire land as a homestead which was within the indemnity limits of the grant to the Leavenworth, Lawrence & Galveston Railway Company, and also within the like limits of the grant to the Missouri, Kansas & Texas Railway Company. The land had been withdrawn under both grants by departmental orders prior to the settlement of Wood. After citing, with approval, the Des Moines River case, the court say of the withdrawals for the benefit of the railroad companies:

"These withdrawals were not merely executive acts, but the latter one, at least, was in obedience to the direct command of congress. Section 4 of the act granting lands to aid in the construction of what is now known as the Missouri, Kansas & Texas Railway (14 Stat. at Large, 290) is as follows:

"'Sec. 4. And be it further enacted, that as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of the said secretary to withdraw from the market the lands granted by this act in such manner, as may be best calculated to effect the purposes of this act and subserve the public interests'."

The grant for the benefit of the Missouri, Kansas & Texas road was a place grant of the odd numbered sections within ten miles on each side of the line of road with a right of indemnity selection within twenty miles. The withdrawal thus sustained by the supreme court was of indemnity lands.

Section 6 of the grant to the Northern Pacific Railroad Company provides that, after filing the map of general route, "the odd sections of land hereby granted shall not be liable to sale, entry or pre-emption." This is the congressional withdrawal which the secretary of the interior insists must be held to be exclusive of any withdrawal by a subordinate authority.

But in *Wood vs. Beach*, a direction to the secretary to withdraw from market "the lands granted by this act," was held not to exclude his authority to withdraw indemnity lands. If it be contended that indemnity lands are "lands granted," then the land in controversy in this case was withdrawn by virtue of the provisions of section 6 above noted, but if indemnity lands are not "lands granted," then a statutory withdrawal of granted lands does not exclude the authority of the executive to withdraw indemnity lands.

DOES SECTION SIX PROHIBIT A WITHDRAWAL BY EXECUTIVE ORDER?

As before stated, the secretary places his decision, holding the withdrawal in question void, on two grounds. The first ground alleged has been discussed.

The second ground is that section six of the act of July 2, 1864, contains in express terms a prohibition against withdrawal of indemnity lands by the executive. The language construed to contain this prohibition is that which is printed in italics in the following quotation of section 6:

"Sec. 6. And be it further enacted, That the president of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, *and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.* And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

It is declared by the secretary, that the provisions extending the pre-emption law and the homestead law to all other lands on the line of said road

when surveyed, forbids the executive from withdrawing from the operation of the pre-emption and homestead laws any lands lying in the indemnity limits of the grant as determined by the map of definite location. An examination, however, of the pre-emption law as then in force, and a reading of this particular portion of the granting act in connection with that law, will show almost to a demonstration that the construction contended for is not only unreasonable but impossible. The pre-emption law of September 4, 1841 (5 Stat. 453), in section 10, after declaring the qualifications and conditions for acquiring public lands by pre-emption and extending the operation of the act to all *surveyed* lands, proceeds to define certain classes of land to which the pre-emption right shall not extend, including land reserved for the support of schools, lands included within the corporate limits of towns, lands on which are situated salines or mines, and further in terms as follows:

"No section of land reserved to the United States as alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement."

This exception of sections reserved to the United States alternate to others granted for the construction of canals, railroads or other public improvements, remained in force until March 3, 1853. At that time the following statute was enacted (10 Stat. 244):

"An act to extend pre-emption rights to certain lands therein mentioned.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,

"That the pre-emption laws of the United States as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same, in soldier's bounty land warrants estimated at a dollar and twenty-five cents per acre, or in gold and silver or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction: *Provided,* that no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve such lands prior to the final allotment of the alternate sections to such railroads by the general land office. *And provided further,* that the price to be paid shall in all cases be two dollars and fifty cents per acre or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres; *and provided further,* that any settler who has settled, or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the supreme court of the United States to be invalid, shall be entitled to all the rights of pre-emption granted by this act and the act of fourth of September, eighteen hundred and forty-one, entitled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights, after the lands shall have been released from reservation in the same manner as if no reservation existed." Approved March 3, 1853.

The effect of this act was to modify materially the restrictive clause in the act of 1841 withhold-

ing from the operation of the pre-emption law sections reserved to the United States, alternate to others granted for the construction of railroads and other public improvements. The plain reading of the act of March 3rd, 1853, shows that its effect was to remove the restriction contained in the pre-emption law of 1841, as to sections alternate to railroad lands from the passage of the act up to the time of "final allotment of the alternate sections to such railroads by the general land office." The act was so construed by the rules of the general land office quoted below (1 Lester, p. 509):

"SYNOPSIS OF RULES ADOPTED BY THE GENERAL LAND OFFICE FOR THE RAILROAD DESK.

"First: By the act of 4th September, 1841 (No. 48). 'No sections of land reserved to the United States, alternate to other sections, granted to any of the states, for the construction of any canal, railroad, or other public improvement,' are subject to the operation of said act. But—

"Secondly: The act of 3rd March, 1853 (No. 222), and Act of 27th March, 1854 (No. 234), materially modify the restrictive or interdictive clause in the Act of 1841. The act of March 3d, 1853, steps in and partly takes off the inhibition contemplated in Act of 1841 by extending the pre-emption laws, at a price of $2.50 per acre, 'over the alternate reserved sections of public lands along the lines of the railroads of the United States,' *where the party had settled and improved the land 'prior* to the *final allotment* of the alternate sections to such railroads, by the General Land Office.'

"Pre-emptions under this Act of 1853, attach within the following periods, to the *United States reserved sections*: 1. Form the date of the 'defi-

nite location' of the road (viz., according to the Attorney General's opinion, February 16, 1857), *when the route is surveyed and staked off on the ground,* until the 'final allotment,' by the General Land Office, of the railroad sections, and that is the *date of official list* certifying the latter sections to the State.

"We take the 'definite location' of the route as the period when this Act of 1853, with its $2.50 price applies, for the reason, not only that such seems to be the current of official decisions, but because, up to such 'definite location' there really are no United States alternate sections so set apart, as would be notice, or grounds of inquiry to purchasers. 2. Pre-emption will not attach under this law to the *United States reserved sections,* after the date of 'final allotment,' to the day of offering at public sale, for the reason that the interdicting clause in the Act of 1841, *again applies* to the United States alternate reserved sections aforesaid, the Act of 1853 only taking it off up to the period of final allotment."

It will be observed further, that the act of March 3rd, 1853, although partially removing the restrictions as to alternate sections of railroad grants contained in the pre-emption law, increased the price per acre at which these lands might be acquired during the period contemplated by the act of 1853, to $2.50 per acre. The right of settlers to acquire lands within the limits of railroad grants alternate to the lands granted for the benefit of railroad companies, was governed by these two acts at the time of the passage of the act of July 2, 1864. Prior to 1853, when the pre-emption law was extended, under the restriction noticed, to these alternate sections, all grants for the construction of railroads, canals and other public improvements,

had been made, not to incorporated companies, but to states for the benefit of such companies as might thereafter be incorporated and should comply with the legislation of the respective states controlling the disposition of land granted to them.

Under the practice just indicated and in force in 1853, considerable time would necessarily elapse between the date of the grant to a particular state and the time when the company organized under the legislation of such state would earn the land and the state would become entitled to demand from the general land office that the land in question be certified to it. The grant of July 2, 1864, to the Northern Pacific Railroad Company, was one of the first instances of a departure from the former uniform practice of granting lands for railroads to states instead of directly to railroad companies. The grant to the Northern Pacific being in terms a present grant and its right to the lands enuring upon the definite location of its line, the period contemplated by the act of 1853 during which the restriction contained in the pre-emption law was removed could not arise. The act of 1853 extended the operation of the pre-emption law over the alternate reserved sections up to the time when the granted lands should be finally allotted by the general land office. Under the provisions of the act of July 2, 1864, no period would arise during which the act of March 3rd, 1853, could operate. As indicated by the construction placed by the department on the act of 1853, the alternate reserved sections were open to pre-emption from the

time of the definite location of a road to the time of final allotment, it being considered that no sections could be identified as "alternate reserved sections" until the definite location of the line. Under the act of 1864,the company took a present title without "final allotment" by the land office, to its granted sections immediately upon the filing of its map of definite location, and to continue and extend the spirit of the act of 1853, the particular language under consideration was inserted in the grant to the Northern Pacific Railroad Company. Without an extension in terms of the pre-emption and homestead laws to the reserved sections in the place limits of the company's grant, no rights to these lands could be acquired thereunder and, extending the policy which brought about the act of 1853 and which has been followed in every grant since the passage of the act of July 2, 1864, this language was inserted:

Grant to California and Oregon Railroad Company, act of July 25, 1866, section 2 (14 Stat. 239); grant to Atlantic and Pacific Railroad Company, act of July 27, 1866, section 6 (14 Stat. 292); grant to Stockton and Copperopolis Railroad Company, act of March 2, 1867, section 5 (14 Stat. 548); grant to Oregon Central Railroad Company, act of May 14, 1870, section 2 (16 Stat. 94); grant to Texas and Pacific Railroad Company, act of March 3, 1871, section 12 (16 Stat. 573). In all of these grants by various provisions the pre-emption law was extended to the reserved alternate sections. That the effect of these provisions and of the lan-

guage in section 6 of the Northern Pacific act was to carry out the spirit of the act of March 3, 1853, and not to forbid a withdrawal of indemnity lands is demonstrated by an examination of the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company (14 Stat. 94). Section 5 of this act is almost word for word the same as section 6 of the Northern Pacific act. But the Placerville and Sacramento grant *contains no indemnity provision* and the only possible purpose for inserting such language was in pursuance of the settled policy to cover the exception in the pre-emption law relating to the reserved sections. And this was the construction placed upon section 6 of the Northern Pacific act before this exception of the pre-emption law was repealed in 1874 by the adoption of the Revised Statutes, and when the executive officers of the government were familiar with the history of legislation. The first interpretation put upon this language is found in a letter of Secretary Usher to the commissioner of the general land office, dated March 9, 1865, transmitting the so-called "Perham Map." This letter is quoted in the opinion in *Oregon & C. R. Co. v. U. S.* 77 Fed. Rep. 79; 48 U. S. App. 6, and is as follows:

"Department of Interior.
Washington, D. C., March 9th, 1865.

"Sir:—

"Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth

instant, requesting that the granted lands along said line be withdrawn from market. In view of the provisions of the 3rd and 6th sections of the act of congress, approved July 2, 1864, (Pamphlet Laws, pages 368-369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. *The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of congress.*

"Very respectfully, your ob't. servant,
"J. P. USHER, Secretary.

"The Commissioner of the General Land Office."

The concluding sentence of this letter shows that in 1865 the provisions of section 6 were understood to refer to the even numbered reserved sections. Moreover, the conclusion of the secretary that section 6 in terms extends the homestead and pre-emption laws to lands in the indemnity limits and forbids their withdrawal is reached without a consideration of the acts of 1841 and 1853 here discussed, and furthermore without giving effect to the words "when surveyed," which occur near the close of the section.

By the terms of the act the pre-emption and homestead laws are only extended to "all other lands on the line of said road" *when surveyed,* and this language must be read in connection with the first provision of the section, to-wit:

"The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road."

This restriction that the pre-emption and homestead laws should not extend to the alternate reserved sections until surveyed is in full accord with the policy of the act of 1853, for in 1853 unsurveyed lands were not subject to pre-emption.

Furthermore, it is important to observe that, by the passage of the act of June 2, 1862 (12 Stat. 413), two years before the passage of the Northern Pacific granting act, the right of pre-emption was extended to all lands belonging to the United States to which the Indian title had been or should be extinguished "under the conditions, restrictions and stipulations" contained in the pre-emption law of 1841. By this it will be seen that under the construction of section 6, act of July 2, 1864, contended for by the secretary of the interior, congress must be held to have enacted that the pre-emption and homestead laws should be extended to the unsurveyed lands situated in the indemnity belt of the grant to the company *when surveyed,* although two years earlier the same laws had been extended to these same lands.

THE DECISION OF THE SECRETARY IS CONTRARY TO THE SETTLED CONSTRUCTION OF THE ACT.

For nearly twenty years, the construction placed by the Interior Department upon the Northern Pacific grant was uniform and sustained the power of withdrawal of indemnity lands. Between 1871 and 1887 more than forty withdrawals of indemnity lands were made and the authority to make such withdrawals remained unquestioned until the decision by the secretary in the Guilford Miller case in 1888. The reports of land decisions by the secretary previous to 1888 are filled with cases in which the validity of these withdrawals was sustained. In the case of Prest vs. Northern Pacific Railroad Company 2 Land Decisions, 506 and in the letter of instructions of Secretary Teller, dated May 17, 1883, 2 Land Decisions 511, the question is considered at length and the power of withdrawal sustained. This construction prevailed during the terms of Secretaries Usher, Browne, Cox, Delano, Kirkwood and Teller.

In *United States vs. Pugh* 99 U. S. 269, this court said: "It is a familiar principle of interpretation that in a case of doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it with effect is entitled to great respect."

In *United States vs. Moore,* 95 U. S. 763, this court gave one of the reasons for this rule: "The

officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

The construction of the executive officers, to which the courts give weight, is the *contemporaneous* and continued construction. Every intendment is in favor of the correctness of the practical construction with which Secretary Vilas was confronted when he announced the doctrine of the Guilford Miller case, but his own decision in that case over-ruling the long settled construction must rest solely upon his argument which we have undertaken to show ignores important and indeed controlling considerations and leads to a conclusion which is incorrect.

The conclusion that the contemporaneous construction of the interior department is correct and that the power of withdrawal existed, is sustained by the supreme court of North Dakota in *Hewitt v. Schultz,* (No. 241 on the present calendar), heard in argument with the case at bar, and by *Thompson v. St. P. M. & M. Ry. Co.,* 83 Fed. Rep. 546; *Southern Pacific R. R. Co. v. Wiggs,* 43 Fed. Rep. 333, and *Southern Pacific R. R. Co. v. Groeck,* 87 Fed. Rep. 970.

In the last case above cited, decided by the circuit court of appeals for the ninth circuit, the court construed section 6 of the grant by act of congress of July 27, 1866, (14 Stat. 292). Section 6 of this act is identical with section 6 of the Northern Pacific act. The court held, not only that section 6

did not forbid a withdrawal of indemnity lands, but constituted a statutory withdrawal after definite location.

THE SELECTION.

The complaint alleges that the railroad company selected the land in controversy, under the direction of the secretary of the interior by filing a selection list in the proper land office, on December 12, 1883, and that this list was accepted by the district land officers on January 5, 1884, who certified that the lands described were public lands, free from claims and rights. It is alleged further that on October 26, 1887, complying with certain instructions of the secretary of the interior issued subsequent to the selection, the railroad company specified as a basis for the land in controversy a tract of equal area excepted from the primary limits of the grant. The allegation of the complaint is categorical that the selection was made under the directions of the secretary of the interior. No tract of lost land was specified as a basis for the selection until 1887, for by the express instructions of Secretary Teller issued May 28, 1883, the duty of specifying the basis of selections was properly committed to the commissioner of the general land office. (12 Land Decisions, 196.)

It was urged by the defendants in the court below that, conceding the land department to have rendered an erroneous decision upon the questions already discussed, yet the plaintiff is remediless for the reason that the land department has never ap-

proved the railroad company's selection. This argument is based upon the ground that it is committed to the secretary of the interior exclusively to determine whether a given tract of land in the indemnity limits of the grant is subject to selection and whether an equal quantity of land has been lost from the primary limits for which indemnity may be taken.

It is undoubtedly true that in the first instance these questions are committed to the secretary of the interior, and in so far as their determination depends upon matters of fact, his conclusions are final. But it does not follow when that officer cancels a selection under an erroneous view of the law and fails to pass upon the question of the status of the land selected or upon the question of lands being lost from the primary limits for which indemnity may be taken, that this failure will defeat the grant.

In *St. Paul & Sioux City Ry. Co. v. Winona & St. Peter Rd. Co.,* 112 U. S. 720, it appeared that certain lands were situated within the indemnity limits of two grants, one made to the state of Minnesota for the benefit of the St. Paul & Sioux City Company, and one for the benefit of the Winona & St. Peter Company.

The grants were made by acts of congress of the same date, and it appeared that the St. Paul & Sioux City Company had made the earlier location of its line. Upon these grounds the interior department held that the right of that company to

lands within its indemnity limits was superior, and although the Winona Company selected the lands first, the lands were certified to the state of Minnesota for the benefit of the St. Paul Company.

This court, speaking of the right of selection, said:

"Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land.

"In this case, and for these reasons, priority of selection secures priority of right. * * *

"It is no answer to this to say that the secretary of the interior certified these lands to the state for the use of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for *lieu* lands or for the extended grant of 1864, out of any odd sections within twenty miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the Winona Company of rights which became vested by its selection of those lands. *Johnson v. Towsley*, 13 Wall. 72, 80; *Gibson v. Choutcau*, 13 Wall. 92, 102; *Shepley v. Cowen*, 91 U. S. 330, 340; *Moore v. Robbins*, 96 U. S. 530, 536."

It is apparent in this case that there was no finding by the secretary of the interior that at the date of selection of the lands in question by the Winona Company, they were of the class of lands subject to selection, or that an equal quantity of lands had been excepted from the place limits of the grant for

which indemnity might be taken, for the selection of the Winona Company was canceled upon the ground of the earlier location of the St. Paul Company.

That the courts will not permit a grant to be defeated by the failure of the secretary of the interior to pass upon questions of fact necessary to the approval of an indemnity selection, is further illustrated by the case of *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1. In that case the Northern Pacific Company filed a bill to hold the St. Paul & Pacific Company trustee of the legal title of certain lands situated within the indemnity limits of its grant which had been certified to the state of Minnesota, and deeded by the state of Minnesota to the St. Paul & Pacific Company, upon the ground that the certification to the state was made under an erroneous construction of the two grants under which the secretary of the interior held that the grant to the state of Minnesota for the benefit of the St. Paul & Pacific Company was prior to the grant to the Northern Pacific Company. This court held that the grant to the Northern Pacific Company was prior in time and that the lands in question were withdrawn for the benefit of the Northern Pacific Company and that the secretary of the interior committed an error of law in certifying the lands to the state of Minnesota. It was objected, however, by the St. Paul & Pacific Company that the Northern Pacific Company was not in privity with the United States and could not complain of

the certification to the state, for the reason that the lands in question had never been selected by the Northern Pacific Company. In this connection the court said:

"As to the objection that no evidence was produced of any selection by the secretary of the interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the secretary in selecting from them, for they were all appropriated."

The selections never having been made, it is apparent that the court assumed the duty of passing upon the character of the lands, and the question of the deficiency in the indemnity limits, and an examination of the record in that case will show that the fact of the deficiency was not established by a finding of the interior department, but by evidence based upon an examination of the public records.

And the reason for the rule that where the secretary of the interior fails to find the facts necessary to the approval of an indemnity selection, and patents are issued to other parties without a finding of such facts, the courts will perform the duty originally committed to the secretary, is found in the decisions of this court in cases involving lands claimed under the swamp land grants to the various states.

By these grants the states took all those legal subdivisions of lands, the major portion of which was so wet and swampy as to be unfit for cultiva-

tion. By the terms of the grants it was made the duty of the secretary of the interior to ascertain the character of the land, and upon identification in this manner, to furnish lists of the lands so determined to be swamp, to the states. And this court has uniformly held that where the secretary neglects or refuses to pass upon the question of the character of the lands the matter may be examined by the courts.

In *Hannibal & St. Joe. R. R. Co. v. Smith*, 9 Wall. 95, the question was presented. In this case the railroad company claimed under a grant from which lands theretofore granted were, of course, excepted, and brought an action to recover a tract of land from one Smith, who claimed the land as swamp land granted by the United States to the state of Missouri, and conveyed by the state to him. It was admitted that if the land did not pass to the state by the swamp land grant, it passed to the railroad company. The secretary of the interior had failed to pass upon the question of the character of the land and the court below allowed the grantee of the state to show by parol evidence that the land was swamp in fact. This court said:

"By the second section of the act of 1850 it was made the duty of the secretary of the interior to ascertain this fact and furnish the state with evidence of it. Must the state lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the state did not depend on his action, but on the act of congress, and though the state might be embarrassed in the assertion of this right by the delay or failure of the secretary of the interior to ascertain and make out

lists of these lands, the right of the state to them could not be defeated by that delay. * * *

"The matter to be shown is one of observation and examination, and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.

"Any other rule results in this, that because the secretary of the interior has failed to discharge his duty in certifying these lands to the state, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they are of the class excluded from the plaintiff's grant."

In *French v. Fyan*, 93 U. S. 169, commenting on *Hannibal & St. Joe Railroad Company v. Smith*, *supra*, and the admission of parol testimony in that case for the purpose of identifying the land as falling within the grant, the court said:

"The admission was placed expressly on the ground that the secretary of the interior had neglected or refused to do his duty; that he had made no selections or lists whatsoever, and would issue no patents, although many years had elapsed since the passage of the act. * * *

"There was no means, as this court has decided, to compel him to act; and if the party claiming under the statute in that case could not be permitted to prove that the land which the state had conveyed to him as swamp land, was in fact such, a total failure of justice would occur, and the entire grant of the state might be defeated by this neglect or refusal to do his duty."

See also *Wright v. Roseberry*, 121 U. S. 488, where the cases on this subject are reviewed and the foregoing propositions are affirmed.

As said by the court in the case of *St. Paul & Sioux City R. R. Co. v. Winona & St. Peter R. R. Co., supra*, the arbitrary refusal of the secretary cannot defeat the right which the court declared to be a vested right acquired by a selection of land properly subject to selection, when made in accordance with the statute.

THE DEFICIENCY.

The complaint alleges that the whole of the line of the Northern Pacific Railroad was definitely located prior to the year 1885, by the filing of maps in the office of the commissioner of the general land office.

The complaint further alleges that at the respective dates of the definite location of the various portions of the line, there were within the primary limits of the grant, 10,624,746.27 acres of land lost from the grant by previous disposition; that at the respective dates of definite location, there were within the indemnity limits prescribed by the act of July 2, 1864, not more than 7,177,769.71 acres of land subject to selection as indemnity.

By the joint resolution of May 31, 1870, (16 Stat. 378) a further indemnity belt ten miles in width on each side of the line was created, from which the company was entitled to satisfy losses occurring after the date of the grant, which could not be satisfied within the first indemnity limits of the state or territory wherein they occurred.

The complaint alleges that of all the lands lost from the primary limits not more than 2,887,076.57

acres were lost after the date of the grant, and that this was the measure of the quantity which could be satisfied from the second indemnity limits, and that the total area of lands in the first indemnity limits, created by act of July 2, 1864, lacked more than 550,000 acres of being sufficient to satisfy the losses required to be made up from those limits.

The proposition is conceded that where no such deficiency exists, the title to indemnity lands under a railroad grant does not vest until selection, and probably not until the approval of such selection by the secretary of the interior. It is insisted, however, that where there are not sufficient indemnity lands within the limits from which indemnity may be taken, the rule is otherwise; that where the reason for the rule is absent, the rule must fail.

The decisions of this court distinguish between the vesting of the title to place lands and indemnity lands merely by reason of the means of identification of the two classes of lands. Lands in place are *identified* by the definite location of the line of road, while indemnity lands are *identified* by selection. In both cases the grant is a "float" and is brought to anchor by different means. *St. Paul & Sioux City Ry. Co. v. Winona & St. Peter Rail-Road Company*, 112 U. S. 720.

It is submitted that the decision of this court in *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1, above referred to, is conclusive on the proposition that where a deficiency exists in indemnity lands, no se-

lection is necessary. In this case the following facts appeared:

By act of congress of March 3, 1871, lands were granted to the State of Minnesota to aid in the construction of the St. Vincent extension of the St. Paul & Pacific Railroad. This grant, however, by its terms, did not become effective until the execution of a release of certain lands before granted. The release was executed December 13, 1871, and the Court held the grant operative from that date. The line of the St. Vincent extension crossed the line of the Northern Pacific Railroad near Glyndon, Minnesota, and there was consequently an overlapping of the two grants, and certain lands fell within both the place limits of the St. Paul & Pacific grant and the indemnity limits of the Northern Pacific grant. The Northern Pacific line was definitely located November 21, 1871, before the grant to the St. Paul & Pacific Company took effect.

Certain of the lands mentioned as falling within the indemnity limits of the Northern Pacific grant were certified to the State of Minnesota, and by it deeded to the St. Paul & Pacific Company. The Northern Pacific Company filed its bill in equity alleging that it was the equitable owner of these lands, and that the St. Paul & Pacific Company was the holder of the naked legal title, and prayed a decree that the legal title was held in trust.

The point was made by the defendant company that the bill could not be maintained for the reason that no selection was shown by the Northern Paci-

fic Railroad Company or approval thereof by the secretary of the interior. This court said, as above quoted:

"As to the objection that no evidence was produced of any selection by the secretary of the interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was therefore no occasion for the exercise of the judgment of the secretary in selecting them for they were all appropriated."

The court sustained the bill and held the St. Paul & Pacific Company trustee of the legal title of the lands in question for the benefit of the Northern Pacific Railroad Company.

The further proposition is well settled, that no one can maintain a bill to hold another trustee of the legal title unless he can show himself in privity with the grantor and possessed of an equity superior to that of him who holds the legal title. *Hartman v. Warren,* 76 Fed. Rep. 157; *Smelting Co. v. Kemp,* 104 U. S. 636, 647.

It follows, therefore, in the case above referred to, that unless the Northern Pacific Railroad Company had shown itself to be in privity with the United States, and possessed of a superior equity, it must have failed in its suit to hold the St. Paul & Pacific Company trustee of the legal title to the lands in question; and it could not have shown itself in privity with the United States as to these lands, or possessed of any equity in them unless

the lands were identified as lands falling within its grant.

The rule is unquestioned that where a party has done all things which the law requires to entitle him to acquire public lands, that he will be considered the equitable owner. *Wirth v. Branson,* 98 U. S. 118; *Hedrick v. A. T. & S. F. Ry. Co.,* 167 U. S. 673.

If, therefore, under the rule declared by this court in the St. Paul & Pacific case, a selection was unnecessary to identify the lands and place the company in privity with the United States, what further was required by the law to be done to earn the lands than was in fact done? A railroad company does not take title to indemnity lands by virtue of a *selection,* the function of a selection is merely to identify the lands as falling within the grant, and thereupon the title passes.

It is submitted that the judgment of the Supreme Court of Washington should be reversed.

C. W. BUNN and
JAMES B. KERR,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

J. M. MOORE,
PLAINTIFF IN ERROR,

v.

D. B. STONE, ET AL.

No. 48.

MEMORANDUM.

In brief just filed, counsel for defendants in error assumes that this case is disposed of by the decision in Northern Pacific Railroad Co. *v.* Sanders (166 U. S. 620); counsel insists this decision rules broadly that until definite location, place lands were subject to pre-emption entry, and indemnity lands likewise subject to entry until a selection, approved by the Secretary of the Interior. The case, however, in nowise involves any question relating to indemnity lands, and as to place lands, merely holds that until definite location, lands subject to the withdrawal on general route are within the disposing power of Congress. This is made clear by the subsequent decisions of this Court, where the *Sanders* case is reviewed: *Menotti* v. *Dillon* (167 U. S. 703, 720); United States *v.* Oregon, etc., R. Co. (176 U. S. 28, 48). To the same effect is Northern Pacific Railroad Co. *v.* Amacker (175 U. S. 564, 9).

C. W. BUNN AND
JAMES B. KERR,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900

No. 148.

J. M. MOORE, PLAINTIFF IN ERROR,

vs.

D. B. STONE, AMMVILLIS ALLEN, ALMA MAY STONE, EDWIN R. STONE, LUCY MYRTLE STONE, SYLVIA S. JENKS, WARREN L. STONE, ORSON EMER STONE, HARLAND CLIFFORD STONE, AND ORLIE OTIS STONE, DEFENDANTS IN ERROR.

Argument for Defendants in Error.

The complaint, printed in transcript (pp. 1 to 13, inclusive), sets out the several sections of the act of Congress of July 2, 1864, which are proper to be considered in determining the sufficiency of the complaint, and also the supplementary joint resolution of Congress of May 31, 1870, and it is not considered necessary to reproduce them here. The complaint also sets out decisions by the Commissioner of the General Land Office and by the Secretary of the In-

terior, in which it would appear that some of the questions of law urged by plaintiff in error were considered and adjudicated against him in the Interior Department; but it does not appear from these decisions, nor from any averment in the complaint, that other questions of fact were not considered and decided in the Interior Department, either before or after the decisions set out in the complaint, which would make the error of those decisions, if erroneous in any respect, innocuous and void of harm. It was essential for the Land Office to find two facts in order to give the railroad company any standing whatever to dispute the preemption claim of defendant Stone: First. That there was a deficiency in the place lands granted to it, which would entitle it to resort to the lieu or indemnity lands. Second. That the indemnity lands selected by it, although within the indemnity limits, were not reserved, sold, granted, or otherwise appropriated prior to the attaching of its rights, and that the same were then free from pre-emption or other claims or rights. The complaint undertakes to conclude these matters by averring the facts as it was claimed they existed, but nowhere does it aver that such facts were found in favor of the railroad company by the department officers, nor does it negative anywhere that such facts may have been found against the railroad company by those officers.

From the facts found by the Commissioner and by the Secretary of the Interior, as disclosed in the complaint, it is seen that the defendant Stone settled on the land in question April 25, 1882, and that he has resided there ever since; that in 1882 he built a house, dug a well, and cultivated a garden on the place; in 1883 he cropped 15 acres to grain; in 1884 and 1885, 15 acres; in 1886 and 1887, 40 acres; in 1888, 45 acres; in 1889, 140 acres, and in 1890, 155 acres; that he had fenced the whole place and had improvements on it worth $700 to $800. The department also found that

the land was occupied and improved by Stone as the home of a qualified settler at the date of the selection by the railroad company. The foregoing are the only facts deemed necessary to be stated in addition to those set out in the brief of plaintiff in error.

ARGUMENT.

First. Nearly every question urged by plaintiff in error is settled against him by the late case of Northern Pacific Railroad Company *vs.* Sanders, 166 U. S., 620. It was there decided that it was the purpose of the act of Congress granting lands to the Northern Pacific Railroad Company to leave the same open to entry, settlement, and the initiation of claims by the general public up to the time that the grant of the company attached to the lands. As is now well established, the grant attached to place lands on the filing of the map of definite location, and to indemnity lands at the time of their selection with the approval of the Secretary of the Interior.

"The only ground on which a contrary view can be rested is the provision in the sixth section of the act of 1864 that 'the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company as provided by this act.' But this section is not to be construed without reference to other sections of the act. It must be taken in connection with section three, which manifestly contemplates that rights of pre-emption or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established. Literally interpreted, the words above quoted from section six would tie the hands of the Government so that even it could not sell any of the odd-numbered sections of the land after the general route was fixed—an interpretation wholly inadmissible in view of the provisions in the third section. The third and sixth sections must be taken together, and so taken it must be ad-

judged that nothing in the sixth section prevented the Government from disposing of any of the lands prior to the fixing of the line of definite location, or for the reasons stated, from receiving, under the existing statutes, applications to purchase such lands as mineral lands."

Northern Pacific Railroad Company *vs.* Sanders, *supra.*

If any re-enforcement of the above reasoning were necessary, it is found in the fact that the joint resolution of Congress approved May 31, 1870—a resolution passed at the instance of the railroad company and for its benefit, and upon which it acted,—gave legislative construction to the granting act of 1864 in exact accordance with the judicial construction reached by the court from a consideration of the act of 1864 alone. (See 16th United States Statutes-at-Large, p. 378.)

Under this holding we are relieved from a consideration of the questions treated of at great length in the brief of plaintiff in error concerning the validity of the several withdrawals of the granted lands by the Secretary of the Interior and the effect of such withdrawals upon the right of settlers to initiate homestead and pre-emption entries.

Second. The only question left to be considered is, Was the settlement of the defendant in error, Stone, on the land in question, prior to the selection of the land by the railroad company, such a settlement as excepted the land from the grant to the railroad company? Stone settled in 1882. The company undertook to select the land in 1883. The department found Stone to be a "qualified settler" on the land, and that his settlement was followed up seasonably by valuable improvements. As soon as might be, conformably to the practice of the department, he perfected his entry and received patent. What steps, if any, he had taken to make record of his settlement prior to the filing of June 30, 1884, the complaint does not state, nor do the proceedings

before the Land Department, so far as the complaint sets them out, disclose. So far as anything appears to the contrary, he was on the land regularly as a pre-emption settler, having taken all the steps permitted to him to protect himself against adverse rights. He was so treated in the hearing before the department, and without suggestion from the railroad company to the contrary. It does appear from the complaint that during all this time there was an order from the Commissioner of the General Land Office on file at the local land office withdrawing the land in controversy from homestead or pre-emption.

Under these facts we claim :

a. That the land was not free from pre-emption at the time the company undertook to select it. Stone, a qualified settler, had settled thereon, made valuable improvements thereon, and lived thereon continuously with the intention of acquiring title under the pre-emption laws. He was in default, if at all, only in respect to the filing of his declaratory statement. The only penalty fixed by the statute for the failure of such a settler to file his declaratory statement is declared as follows :

"Otherwise his claim shall be forfeited and the tract awarded to the next settler in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law " (Revised Statutes, section 2265).

That this forfeiture inures only for the benefit of another settler, and that if the right of such a settler has not intervened the original settler may file his declaration at any time, has been the settled law ever since the case of Johnson *vs.* Towsley, 13 Wallace, p. 72. The court in that case say :

"If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after

the three months, while the party is still in possession, he makes his declaration, and this is done before any one has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration, or in making it void when made, and we think that Congress intended to provide for the protection of the first settler by giving him three months to make his first declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right. As Towsley's settlement and possession were continuous, and as his declaration was made before Johnson or any one else asserted claim to the land or made a settlement, we think his right was not barred by that section under a sound construction of its meaning" (Johnson *vs.* Towsley, *supra.* See also, to same effect, Lansdale *vs.* Daniels, 100 U. S., 113; Whitney *vs.* Taylor, 158 U. S., 85).

b. The order of the Commissioner of the General Land Office withdrawing the land from entry excused Stone from filing his declaratory statement. While the order had no validity in law, it was binding as a rule of action on the subordinate officers, and it was undoubtedly their duty to obey it. Undoubtedly they would have obeyed it. An attempt, then, on the part of Stone to make his filing would have been vain and useless, and the law does not exact a vain and useless thing from any person (Tracey *vs.* Irwin, 18 Wallace, 549; United States *vs.* Lee, 106 U. S., 196).

c. The complaint is silent as to what steps, if any, Stone may have taken between the date of his settlement on the land and the acceptance of his declaratory statement at the land office to attempt to comply with the requirement of the law concerning the filing of his declaratory statement within three months. For aught that appears he may have offered his declaration within the time provided and had the same refused. He was treated by the Land Department as a qualified settler on the land, and his position in that respect

does not appear to have been questioned by the railroad company. The only question raised by the company and litigated by it in that hearing was whether such a settler as Stone was, having qualified himself in every way, could take in opposition to its grant. Indeed, it is questionable if that is not the only contention intended to be raised by the complaint here.

We respectfully submit that the complaint is insufficient to negative either the *bona fides* of Stone's settlement or the doing by him of every act necessary to keep his rights alive against any and every person in the world, or to show that on the facts before the Land Department that department had committed an error in law in deciding such to be his status (Durango, etc., Co. *vs.* Thayer, 80 Federal Reporter, 427).

Third. But if we are in error in insisting that Stone was a qualified pre-emptor, with all the standing and rights of such, at the time of the selection of the land by the company, notwithstanding his failure to file declaratory statement, we insist that his settlement, residence, and cultivation with the intention of availing himself of the pre-emption law constituted a "claim" within the meaning of the excepting clause of the granting act.

The place lands to which the grant of the railroad company attached were lands not "reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights."

The indemnity lands, to which the railroad company was entitled to resort in case of deficiency in the place lands, are described in the statute simply as "other lands." What "other lands" did the statute intend to give the company a right to resort to? Manifestly, other lands of the class directly granted, other lands "not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other

claims or rights." It is impossible to suppose that, as to indemnity lands which the company might never be compelled to resort to, and which it was never contemplated it would be required to exhaust, Congress intended to deal more illiberally with the general public than when dealing with place lands. If, then, a settlement of the character of the defendant in error on place lands would defeat the attaching of the grant of the company to such lands, such settlement on indemnity lands would *a fortiori* defeat their selection by the company.

Such a settlement as that of defendant in error, according to the settled mode of construing these land grants, excepts the land from the operation of the grant. Such grants are construed strictly against the grantees and liberally in favor of the public whose rights may conflict with those of the grantees. If the settlement can be said to have been not a pre-emption because there had been no filing, it certainly constituted a "claim or right" within the meaning of the excepting clause (Broder *vs.* Water Co., 101 U. S., 274; R. R. Co. *vs.* U. S., 92 U. S., 733; Shipley *et al. vs.* Cowan, 91 U. S., 330; Kansas Pacific R'y Co. *vs.* Dunmeyer, 113 U. S., 629; Northern Pacific R. R. Co. *vs.* Musser Santry Co., 168 U. S., 164).

"We have had occasion to construe a very common clause of reservation in grants to other railroad companies and in aid of other works of internal improvement, and in all of them we have done so in the light of the general principle that Congress, in the act of making these donations, could not be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect, were still meritorious and had just claims to legislative protection" (Broder *vs.* Water Co., *supra*).

"The company had no absolute right until the road was built or that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his rights became absolute. The pre-emptor had similar duties to perform in regard to cultivation, residence, &c., for a shorter period, and

then payment of the price of the land. It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligations. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the Government as to the performance of their obligations" (Kansas Pacific R'y Co. *vs.* Dunmeyer, *supra*).

"In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. If on examination there are doubts about that intention or the extent of the grant, the Government is to receive the benefit of them. * * * Such grants could not otherwise be construed; for Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow without disturbing existing relations and producing vexatious conflicts" (R. R. Co. *vs.* U. S., *supra*).

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States shall have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of title, when the same are regularly followed up, is deemed to be first in right" (Shipley *vs.* Cowan, *supra*).

"Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply 'free from rights,' but 'free from claims,' and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress

meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road" (Northern Pacific Railroad Co. *vs.* Musser Santry Co., *supra*).

Fourth. We do not read the case of The N. P. R. R. Co. *vs.* Colburn, 164 U. S., 383, as conflicting with any of the foregoing views. In that case there was nothing to show that Kelly, the occupant of the land, was a qualified, *bona fide* settler under the homestead or pre-emption laws. He had never made any filing on the land, and his occupancy had long been abandoned. The decision of the Secretary of the Interior, as noticed by the court, was based simply on the fact of occupation and cultivation. He was a mere squatter, a trespasser, without rights against the Government or against any person or corporation.

It would be impossible for any court to hold that occupancy of such a trespasser constituted either a pre-emption or a "claim or right" within the meaning of the excepting clause of the railroad land grant; but that the court did not mean to hold that as against this railroad grant an actual filing was necessary to constitute a *bona fide* settlement by a pre-emptor or homesteader which would defeat the grant is evident from the concluding paragraph of the opinion. The court there notices the omission of the word "attached" from the Northern Pacific grant, which word had been deemed significant in the construction of other grants, and expressly reserves the effect of that and also of other peculiarities of the case for further consideration.

The supreme court of Minnesota, in the case of McHenry *vs.* Nygard, 72 Minn., 2, have fallen into the error of counsel for plaintiff in error in construing the Colburn case; but that court offers nothing by way of reasoning to sustain the position for which it cites the Colburn case as authority,

and of course if it has erred in construing that case, then its force as an authority or precedent falls to the ground.

In the department cases cited by plaintiff in error on page 11 of his brief, following the Colburn case, the grants under construction all used the word "attached," and the decisions all proceed on the peculiar significance attached to that word by the decisions of this court. Moreover, each of the cases will be found on examination to have had special features negativing the *bona fides* of the settlement.

Fifth. On the question of the Executive withdrawal or reservation, which the plaintiff in error insists operated as a bar to the initiation of a pre-emption right by Stone, we submit, in addition to the case of Northern Pacific Railroad Company *vs.* Sanders, *supra*, the following departmental decisions:

N. P. R. R. Co. *vs.* Miller, 7 Land Dec., 100; N. P. R. R. Co. *vs.* Davis, 19 Land Dec., 87; Cole *vs.* N. P. R. R. Co., 17 Land Dec., 8; N. P. R. R. Co. *vs.* Fugeli, 10 Land Dec., 288; Spencer *vs.* N. P. R. R. Co., 10 Land Dec., 440; S. P. R. Co. *vs.* Kanawyer, 23 Land Dec., 500; M., K. & T. R. Co. *vs.* Troxel, 17 Land Decisions, 122; N. P. R. Co., *vs.* Lilothun, 21 Land Dec., 487; Grunewald *vs.* N. P. R. Co., 24 Land Dec., 195; N. P. R. Co. *vs.* Willis, 21 Land Dec., 395; S. P. R. Co. *vs.* McKinley, 22 Land Dec., 493; N. P. R. Co. *vs.* Flannery, 20 Land Dec., 127; Stuart *vs.* S. P. R. Co., 22 Land Dec., 61; Hastings *vs.* Christensen, 22 Land Dec., 257.

The foregoing cases amply sustain the position that all these withdrawals were nullities because in conflict with the true intent and purpose of the granting act.

The plaintiff in error takes issue in his brief with the decisions of the Land Office, but he does not notice the Sanders case, decided by this court, and which is infinitely more sweeping in its effect than any of the departmental decisions.

His idea that the positive direction of section 6 of the

granting act, to the effect that all lands on the line of the road not granted should be open to homestead and pre-emption settlement, was for the purpose of abrogating the provision of the pre-emption act of 1841, reserving from the operation of that act the sections of land alternate to other sections granted to the States in aid of canal, railroad, or other public improvement, falls to the ground when we examine the act of Congress approved June 2, 1862 (12 Statutes at Large, p. 413). That act was intended to remove all restrictions on the right to pre-empt lands fitted for pre-emption settlement and not otherwise appropriated. It removed the restriction against settlement on unsurveyed lands and on alternate reserved sections on lands within railroad land grants. It was so construed by the compilers of the Revised Statutes and has ever since received such construction by the Land Department. (See Revised Statutes, sec. 2257.)

The words "all the lands" in the act of 1862 have been properly construed to mean all lands fitted for agriculture, not valuable for minerals or salines, and not reserved or occupied for some one of the manifestly overruling purposes mentioned in the pre-emption act of 1841. The right was extended to all such lands, subject to the other conditions, restrictions, and stipulations of the act of 1841. The act of 1862 must have been so construed to have had any sensible effect at all, because all the limitations on the character of the lands which might be pre-empted were in the same section of the act of 1841 and stated in the same way, and it is manifest that it was not intended to leave them all in force.

The language of the act of 1862 is as follows:

"That all the lands belonging to the United States to which the Indian title has been or shall be extinguished, shall be subject to the operations of the pre-emption act of the fourth of September, eighteen hundred and forty-one, and under the conditions, restrictions and stipulations therein mentioned."

It will be seen, then, that the act of 1862, two years before the granting act here under consideration, had accomplished the purpose which plaintiff in error insists the provisions of section 6 of the granting act were intended to accomplish.

But, in view of the decision of this court in the Sanders case, there is but little utility in considering what object Congress had in mind by the use of the language employed in section 6 of the granting act. That case holds that section 6 must be construed in connection with section 3, and that, construing both together, it is shown to have been the intention of Congress to leave both the lands granted and those not granted, the place lands as well as the indemnity lands, open to settlement, purchase, and the initiation of claims at all times prior to the attaching of the title of the railroad company, and the consequence necessarily follows that prior to the attaching of the railroad title there could be no withdrawal, and after the attaching of the railroad title withdrawal would be a vain and futile act.

Seventh. It is the doctrine of this court in this class of cases, too well settled to need the citation of authorities, that a party seeking the aid of the court must prevail, if at all, on the strength of his own right and not on the weakness of the title of his adversary. The lands sought to be subjected to plaintiff's right are indemnity lands, never granted to the company, but the latter was given the right to resort to them in the event of the United States not having "full title" to all the granted lands, or some of them having been "reserved, sold, granted, or otherwise appropriated," or their not being "free from pre-emption or other claims or rights" at the time of the definite location of the road. The company had no right or title in them prior to their selection, with the approval of the Secretary of the Interior, in lieu of lands in place which had been lost to the company

by reason of the excepted cases referred to (Kansas & Pacific R. Co. *vs.* Atchison R. Co., 112 U. S., 414; St. Paul, etc., R. Co. *vs.* Winona R. Co., 112 U. S., 720; Ryan *vs.* C. P. R. Co., 99 U. S., 382; Cedar Rapids, etc., R. Co. *vs.* Herring, 110 U. S., 27; Wisconsin R. Co. *vs.* Price Co., 133 U. S., 496; Wisconsin R. Co. *vs.* Forsythe, 159 U. S., 46).

This court, in Wisconsin R. Co. *vs.* Price Co., *supra*, laid down the rule which should govern in the allowance of these indemnity selections as follows:

"The approval of the Secretary was essential to the efficacy of the selections and to give the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the lands granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected, could be properly taken for those deficiencies."

Where is the allegation in the complaint that the Secretary found any deficiency in the place lands, or that the particular indemnity land selected could be properly taken for those deficiencies? There is none. That this omission is fatal to the sufficiency of the complaint we cite Durango, etc., Co. *vs.* Evans, 80 Federal Reporter, 427; Stewart *vs.* McHarry, 159 U. S., 643; Bishop of Nesqually *vs.* Gibbon, 158 U. S., 155; Steel *vs.* S. M. R. Co., 106 U. S., 447; Gale *vs.* Best, 78 Cal., 235; New Dunderberg Min. Co. *vs.* Old *et al.*, 79 Fed. Rep., 598.

The case of St. Paul and Pacific R. Co. *vs.* N. P. R. Co., 139 U. S., 1, properly considered, does not militate against this position. The question in that case was between two land-grant roads. The St. Paul and Pacific, taking under a later grant than the Northern Pacific, undertook to extend its place grant over the indemnity limits of the North-

ern Pacific. The court held that this could not be done. Said the court :

"We are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself."

This was stated by Mr. Justice Brewer in another form when deciding the same case in the lower court :

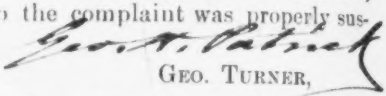
"The decision in 97 U. S., *supra*, places all land-grant roads on the same plane, and that a different one from that occupied by settlers and private purchasers, and settles all conflicts of title by a rule clear, simple, and just, viz : priority of grant. Congress may fairly be regarded as standing indifferent between all roads and intending to apply this just and simple rule of priority as between successive beneficiaries" (Northern Pac. R. Co. *vs.* St. Paul, etc., Co., 26 Federal Rep., 551).

The concluding language from the principal opinion quoted in the brief of plaintiff in error must be considered in the light of the parties before the court and the nature of the right urged by each. The allowance of the right of either would absorb everything and leave nothing for the other. Moreover, if the right of the Northern Pacific attached, it was prior in point of time and left nothing whatever for the grant of the St. Paul and Pacific to operate on. As between two such litigants urging such rights, the court might well say, "there was therefore no occasion for the exercise of the judgment of the Secretary in selecting them (the lands), for they were all appropriated."

Upon all the foregoing questions except those relating to the qualification of defendant in error, Stone, as a pre-emption settler, we cite, as determining those questions in our

favor, the late case of Southern Pacific Railroad Company *vs.* Wood, 124 California, 475.

We respectfully submit that the complaint is insufficient, and that the demurrer to the complaint was properly sustained.



GEO. TURNER,

Counsel for Defendants in Error.

7042

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 295. 49.

J. M. MOORE, PLAINTIFF IN ERROR,

vs.

JOHN CORMODE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED MAY 4, 1899.

(17,395.)

(17,395.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 285.

J. M. MOORE, PLAINTIFF IN ERROR,

vs.

JOHN CORMODE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1899.

1 In the Superior Court of the State of Washington for Garfield County.

J. M. MOORE, Plaintiff,
v.
JOHN CARMODE, Defendant. } No. 3123. Amended Complaint.

Plaintiff herein, for amended complaint and cause of action, alleges:

I.

That at all the times hereinafter mentioned the Northern Pacific Railroad Company was a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as should be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's sound, with a branch line via the Columbia river to a point at or near Portland, in the State of Oregon.

II.

That the third section of said act of Congress is in words and figures as follows, to wit:

"And be it further enacted, That there be, and hereby is,
2 granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied

by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, that the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided, fur-
3 ther, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided: And provided, further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: And provided, further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Northern Pacific railroad.'"

III.

That the fourth section of said act of Congress was and is in words and figures as follows, to wit:

"And be it further enacted, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and conterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, that not more than ten sections of land
4 per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad, from the places of beginning on Lake Superior to

the western boundary of Minnesota: Provided, also, that lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act."

IV.

That the sixth section of said act of Congress was and is in words and figures as follows, to wit:

"And be it further enacted, That the President of the United States shall cause the lands to be surveyed forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

V.

That the twelfth section of said act of Congress was and is in words and figures as follows:

"And be it further enacted, That the acceptance of the terms, conditions and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States."

VI.

That said railroad company accepted the terms, conditions, and impositions of said act of Congress in writing, under its corporate seal, pursuant to the direction of its board of directors first had and obtained, and on the twenty-ninth day of December, A. D. 1864, served such acceptance on the President of the United States.

VII.

That by joint resolution of Congress approved May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage and for *the* purposes," it was resolved and provided in words and figures as follows, to wit:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation, and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main line to some point on Puget sound, via the valley of the Columbia river,
6 with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound, and in the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States and designated by odd numbers in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four, and that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points: Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized at the expiration of five years after the completion of the entire road shall be subject to settlement and pre-emption like other lands at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceedings or the mortgaged lands hereby granted or any of them be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or de-
7 fault of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: Provided further, that in the construction of the said railroad American iron or steel only shall be used, the same to be manufactured from American ores exclusively."

VIII.

That said railroad company, on the 21st day of February, 1872, filed in the office of the said Commissioner of the General Land Office of the United States a certain map or plat showing the general route of its main line of railroad from a point on Lake Superior, Wisconsin, westerly to and through the then Territory (now State) of Washington to Wallula.

That upon the filing of said map or plat on said 21st day of February, 1872, showing the general route of the main line of said railroad from Spokane to Wallula, in said Territory (now State) of Washington, the said Commissioner of the General Land Office, under and in pursuance of the directions of the Secretary of the Interior, marked and designated upon the maps and records of his office the limits of the lands granted by Congress to said railroad company to aid in the construction of said railroad opposite to and coterminous with said line of railroad, as shown on said plat, to wit, forty-miles limit on each side of said line of the general route of the main line of said railroad.

That thereafter said Commissioner of the General Land Office, acting under the direction and in pursuance of the instructions of the Secretary of the Interior, transmitted to the United States district land officers for the district within which said premises were and are situate a diagram of that portion of said general route of the main line of said railroad with the said forty-miles limit s indicated thereon, and that said Commissioner of the General Land Office, so acting under the direction and in pursuance of the instructions of the Secretary of the Interior, ordered and directed that the lands within said limits be, and the same were thereby, withdrawn and held reserved from sale or homestead or other entry, and directed the United States district land officers of said land district to withdraw and hold reserved all of said lands within said described limits from sale, pre-emption, or homestead or other entry, which said letter of instructions to said district land officers and said diagram and plat were received and filed in said district land office on the 22nd day of April, 1872: that the N. E. ¼, sec. 3, T. 13, R. 42 E., W. M., was within 40 miles of said general route.

IX.

That thereafter the said railroad company proceeded with the work of surveying, locating, and building the line of its said railroad, and on the 4th day of October, 1880, said railroad company definitely located and caused to be filed a plat or map of that portion of its main line of said railroad extending from the city of Spokane, in the county of Spokane, in the then Territory (now State) of Washington, to the said Wallula, in the then Territory (now State) of Washington, which said map or plat of definite location of said railroad had theretofore been transmitted to the Secretary of the Interior, and upon the said 4th day of October, 1880, said map or plat of definite location was accepted by the said Secretary of the

Interior and by him caused to be filed in the office of the Commissioner of the General Land Office of the United States of America.

That upon the filing of said map or plat of definite location on the 4th day of October, 1880, of that portion of said railroad extending from Spokane to Wallula, in the then Territory (now State) of Washington, so approved and filed, as aforesaid, the said
9 Commissioner of the General Land Office, acting under the instructions and directions of the Secretary of the Interior, marked and designated upon the maps and records in his office the limits of the lands granted by Congress to said railroad company to aid in the construction of said railroad, opposite to and coterminous with said line of railroad, as shown on said map or plat, forty and fifty mile limits on each side of said line of definite location.

That thereafter the said Commissioner of the General Land Office, under the directions of the Secretary of the Interior of the United States, transmitted to the United States district land officers for the district wherein the hereinafter described premises were and are situate, to wit, at Walla Walla, Washington, the diagram showing that portion of said railroad so definitely fixed, as aforesaid, with the place and first indemnity limits indicated thereon, and the said Commissioner of the General Land Office, so acting under the instructions and directions of the Secretary of the Interior, withdrew and held reserved all of said lands within said described limits from sale or homestead or other entry, and directed the United States district land officers of said land office to withdraw and hold reserved all of said lands within said described limits from sale or entry, and said letter of instructions to said district land officers and diagram were received and filed by them, the said district land officers, on the 30th day of November, 1880.

X.

That that certain tract or parcel of land situate, lying, and being in Garfield county, State of Washington, and more particularly described as the northwest one-quarter of section three, in township thirteen north, range forty-two east, Willamette meridian, was and is opposite to and coterminous with said line of definite
10 location so fixed on October 4, 1880, as aforesaid, and was and is more than forty miles, but less than fifty miles, distant from the said line of definite location of said railroad and within said first indemnity limits, and was at the date of said grant to said railroad company and on February 21, 1872, and on April 22, 1872, and at the time when the line of said railroad through the Territory (now State) of Washington was definitely fixed and located and a plat thereof approved and filed in the office of the said Commissioner of the General Land Office in the manner and upon the date aforesaid, public land of the United States, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated and free from pre emption or other claims or rights, and was and is non-mineral.

XI.

That upon the filing of said orders of withdrawal and the premises and by virtue thereof and of the filing of each of them the said premises, to wit, the northwest quarter of section three, in township thirteen north, range forty-two east, Willamette meridian, in Garfield county, State (then Territory) of Washington, became and thereafter remained withdrawn from and not subject to sale or other entry under the laws of the United States.

XII.

That prior to the year 1885 said Northern Pacific Railroad Company definitely located the whole of the main and branch lines of its said railroad and caused maps or plats of said definite location of the whole of its main and branch lines, approved by the Secretary of the Interior, to be filed in the office of the said Commissioner of the General Land Office.

That prior to 1888 said Northern Pacific Railroad Company constructed and completed its said railroad and telegraph line, so definitely located as aforesaid, upon the lines of such definite
11 location, extending from Lake Superior to Puget's sound—both main and branch lines—in all respects as a first-class railroad and telegraph line; that as fast as portions of said railroad and telegraph line equal to or exceeding twenty-five miles in length were so constructed as aforesaid they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress; that such reports were duly accepted and approved by the President of the United States, as provided in said act of Congress approved July 2, 1864.

XIII.

That at the respective dates of the definite location of the various portions of the whole of the said main and branch lines of said railroad and within the primary limits of the grant to said railroad company there were ten million six hundred and twenty-four thousand seven hundred and forty-six and twenty-seven one-hundredths (10,624,746.27) acres of land which were lost from said grant by reason of the exceptions contained in said act of Congress of July 2, 1864; that at said respective dates of definite location there were within the indemnity limits prescribed in said act of Congress approved July 2, 1864, not more than seven million one hundred and seventy-seven thousand seven hundred and sixty nine and seventy-one one-hundredths (7,177,769.71) acres of land subject to selection under the terms of said act of Congress of July 2, 1864, as indemnity for lands excepted from said grant.

That of said ten million six hundred and twenty-four thousand seven hundred and forty-six and twenty-seven one-hundredths (10,624,746.27) acres of land so excepted from said grant, and for

which said railroad company was entitled to receive lands
12 in lieu thereof, *and* more than two million eight hundred and eighty-seven thousand and seventy-six and fifty-seven one-hundredths (2,887,076.57) acres were lost to and excepted from said grant subsequent to the passage and approval of said act of July 2, 1864, and said last-mentioned two million eight hundred and eighty-seven thousand and seventy-six and fifty-seven one-hundredths (2,887,076.57) acres of said total of ten million six hundred and twenty-four thousand seven hundred and forty-six and twenty-seven one-hundredths (10,624,746.27) acres, so lost as aforesaid, was the only portion thereof which could or can be satisfied under the provisions of the said joint resolution of Congress approved May 31, 1870, and that the total area of lands in the indemnity limits of said grant to said company, subject to selection as indemnity at the respective dates of the definite location of the various portions of the line of said railroad, lacked more than five hundred and fifty thousand acres of being sufficient to satisfy the losses of said grant.

That plaintiff alleges that by virtue of the premises and upon the definite location of the line of said railroad the said Northern Pacific Railroad Company became the owner in fee-simple of the northwest quarter of section three, in township thirteen north of range forty-two east, Willamette meridian, in Garfield county, in the then Territory (now State) of Washington.

XIV.

That on the twelfth day of December, 1883, the said Northern Pacific Railroad Company selected the northwest quarter of section three, in township thirteen north of range forty-two east, Willamette meridian, in Garfield county, in the then Territory (now State) of Washington, under the direction of the Secretary of the Interior, under the provisions of the said acts of Congress, as
13 indemnity and in lieu of other lands excepted from its grant; that so acting under the direction and instructions of the Secretary of the Interior, and on the said 12th day of December, 1883, said railroad company filed in the United States district land office at Walla Walla, in the then Territory (now State) of Washington, which was the district in which said tract so selected was situate, its certain list No. 1 showing its said selection of said premises, and at the time of filing said list the said railroad company tendered and paid to said officers of said United States district land office all the fees required by law; that at the date of said selection said tract so selected was public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, except as herein set forth, and was free from pre-emption or other claims or any claim or rights or right, which list was accepted, allowed, and approved by said officers of the district land office at Walla Walla on January 5, 1884, and on said date transmitted said list to the Commissioner of the General Land Office, at Washington, D. C., which was within a few days thereafter received

by said Commissioner; that on October 26th, 1887, in compliance with and in pursuance of certain orders and directions subsequently made by the Secretary of the Interior, said railroad company did designate the losses for which the above mentioned and described premises were selected as indemnity; that by reason of the facts hereinbefore set forth the said Northern Pacific Railroad Company became the owner in fee and entitled to the immediate and exclusive possession of said lands and the whole and every part thereof, and was the owner of the complete equitable title therein and thereto.

XV.

That said railroad company selected the above mentioned and described premises in lieu of the following mentioned and
14 described property, to wit:

Lot 3 of N. W. ¼, sec. 3, T. 13, R. 42, was selected in lieu of N. E. ¼ of N. W. ¼, sec. 21, T. 20, R. 6; and lot 4 of said sec. 3 was selected in lieu of lots 2 and 3 of sec. 29, T. 20, R. 6; and the S.W. ¼ of N. W. ¼ of said sec. 3 was selected in lieu of N. E. ¼ of N. W. ¼ of said sec. 29; and the S.E. ¼ of N.W. ¼ of said sec. 3 was selected in lieu of the S. W. ¼ of S. E. ¼ of said sec. 29, — was selected was excepted from said grant to said railroad company and had before the selection, as aforesaid, been patented to private entrymen; that said tract so designated as a loss and in lieu of which said selection was made is coterminous with and within forty miles of said line of definite location of the said Northern Pacific railroad in the then Territory (now State) of Washington, said tract so lost being the same quantity as that so selected.

XVI.

That on July 2nd, 1895, said Northern Pacific Railroad Company, for and in consideration of the sum of one hundred and thirty-five and sixty one-hundredths dollars ($135.00), sold and conveyed by general warranty deed the north half of section 3, in township 13 north of range 42 east of the Willamette meridian, in Garfield county, State of Washington, to the plaintiff herein, which said sum was so paid by the plaintiff to the said Northern Pacific Railroad Company in cash.

XVII.

That on the 17th day of July, 1890, defendant presented for filing a declaratory statement in the district land office of the United States at Walla Walla, Washington, alleging that the land in controversy was settled on in March or April, 1882, by Mrs. Ora Standiford, and that she — a subsequent purchaser of her improvements resided thereon continuously until 1889, where defend-
15 ant purchased the said improvements and moved on to the said land; that thereupon and thereafter a hearing was ordered to determine the status of said land and the right of the said defendant, The Northern Pacific Railroad Company, therein and thereto and the condition thereof at the time of the said selec-

tion by the said company, as aforesaid; that said hearing was had before the officers of the United States district land office at Walla Walla, Washington, and the result thereof was adverse to the said railroad company, the said land officers, to wit, the register and receiver of the land office at Walla Walla, Washington, deciding and holding that the settlement upon said premises by the said Ora Standiford in March or April, 1882, and the occupation thereafter of said premises by her, and the subsequent purchases of her improvements, which improvements were purchased by defendant in the fall of 1889, and the said application of the defendant made in July, 1890, as aforesaid, excepted said lands from the said grant to the Northern Pacific Railroad Company, and for the reasons that the said lands were not subject to selection by the said company, as aforesaid, and said register and receiver thereupon recommended that said selection be cancelled as to the property hereinbefore described, which decision was rendered on the — day of January, 1891, and thereafter an appeal was taken from the decision of the register and receiver of said land office to the Commissioner of the General Land Office, and thereafter, to wit, on the — day of April, 1895, said Commissioner of the General Land Office decided adversely to said railroad company, and thereafter an appeal was taken to the Secretary of the Interior, and on May 20th, 1896, said Secretary of the Interior decided said matter adversely to said railroad company, which said decisions of the Commissioner of the General Land Office and of the Secretary of the Interior are in words and figures following, to wit:

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 25th*, 1895.

JOHN CARMODE
v.
NORTHERN PAC. R'Y CO.

Involving the N. W. ¼, sec. 3, T. 13 N., range 42 east.

Register and receiver, Walla Walla, Wash.

SIRS: I have considered the above-entitled case, involving N. W. 3, 13 N., 42 E., appeal by the R'y Co. from your decision in favor of Carmode. The land is within the indemnity limits of the grant to the Northern Pac. R. R. Co., and was selected by the Co. Jan. 5th, 1884, list No. 1.

Both parties appeared at the hearing held Jan. 6th, 1891, and from the testimony then taken it appears in substance as follows: The land was settled on March or April, 1882, by Mrs. Ora Standiford, who was qualified to enter under the homestead law. Her settlement consisted of the erection of a frame house 16 x 18 ft., 1 story and a half high, on the land, the plowing and cultivating of three or four acres, and the digging of a well. At that time she established her residence on the land and remained there continuously with her family until the fall of 1885, when she sold her im-

provements upon and interest in the land to John A. Long, who occupied the land for a short time and was succeeded by his brother, Henry W. Long, in 1888, who remained in possession until the fall of 1889, when the present applicant, Carmode, who applied for same under pre-emption law in July, 1890, purchased the improvements and moved onto the land. Since then Carmode has continu-
17 ously resided upon and improved the land. It would thus appear that on Jan. 5, 1884, when the right of the R'y Co. attached, the land was embraced in the *bona fide* settlement of a party, Mrs. Sta-diford, qualified to enter the same under the settlement laws. Your decision is therefore affirmed and the Co.'s selection of that date held for cancellation as invalid. You will so advise Carmode. The Co.'s resident attorneys will be so advised by this office.

Very respectfully, S. W. LAMOREAUX, *Comm.*

(Copy.)

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DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May* 20, 1896.

NORTHERN PACIFIC R. R. CO. *vs.* JOHN CARMODE. } Decision of April 25, 1895, Affirmed.

Commissioner of the General Land Office.

SIR: The Northern Pacific railroad appealed from your decision of April 25, 1895, cancelling their selection made January 5, 1884, for the N. W. ¼ of sec. 3, 13 N., 42 E., Walla Walla land district, Washington, and sustaining John Carmode's application for the same tracts. The facts are sufficiently cited in your said decision.

After considering the evidence, the assignments of error, and the briefs of counsel, I am of the opinion that your said decision appealed from was not error, and the same is accordingly affirmed.

Very respectfully, HOKE SMITH, *Secretary.*

18

XVIII.

That the said decisions of the register and receiver of the General Land Office and the Secretary of the Interior and of each of them were made and rendered by them and each of them under misapprehension and mistake of law, and the said decisions and each of them are contrary to the law.

XIX.

That under the rules and practice of the Department of the Interior the said decision of the Secretary of the Interior finally closed and determined the said controversy as to the said tract of land in said department, and the parties thereto were notified thereof, and that said contest was closed on July 10, 1896.

That thereafter, to wit, on the — day of ——, 189–, the defendant made what purported to be final proof, and there was issued

to him what purported to be final receipt of and for said land in said district land office, in which said receipt it was recited that said defendant was entitled to a patent for said land from the United States, and thereafter, to wit, on the 2nd day of May, 1898, a patent of the United States purporting to convey title to said premises, to wit, the northwest quarter of section three, in township thirteen north of range forty-two east, Willamette meridian, in Garfield county, Washington, in fee-simple to said defendant, was issued to him, the said defendant.

XX.

Plaintiff avers that by reason of the premises said United States district land officers, said Commissioner of the General Land Office, and said Secretary of the Interior were wholly without jurisdiction to consider the said application of said defendant to make pre-emption entry of said land, for the reason that said land was not
19 public land of the United States and was not subject to homestead entry, but at the time when said defendant made application to enter said land the same was withdrawn, and that said decisions allowing said defendant to make pre-emption entry of said land were void, and said entry of said defendant was and is void and of no effect.

XXI.

That by reason of the foregoing facts said railroad company became and was the owner in fee-simple of said premises hereinbefore first described and entitled to the legal title thereof and thereto and to the issuance of a patent therefor by the United States of America, which was wrongfully and unlawfully withheld, as aforesaid, and the said patent so issued to defendant constitutes the defendant a trustee, who holds the legal title for the benefit of the plaintiff herein, and casts a cloud upon the title of plaintiff herein, and the defendant wrongfully and unlawfully withholds the possession of said premises, to wit, the northwest quarter of section three, in township thirteen north of range forty-two east, Willamette meridian, in Garfield county, Washington, from plaintiff, to the immediate and exclusive possession of which and the whole thereof plaintiff is entitled; that at divers and sundry times pl'ff has demanded possession of and for said premises.

Wherefore plaintiff prays judgment:

I. That the defendant may be required to set forth the nature of his claim, and that all adverse claims of defendant may be determined by a decree of this court.

II. That defendant be declared a trustee for the use and benefit of plaintiff, and that by said decree it be declared and adjudged that the defendant has no right, title, interest, or estate whatever in or to the said lands and premises or any part thereof; that the title of plaintiff be decreed good, valid, and a fee-simple title, and
20 that defendant be required to execute and deliver to plaintiff deed or deeds so as to vest in plaintiff a complete record title in and to said premises; that any and all pretended claims of defendant be for naught held and cancelled.

III. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said lands or premises or any part thereof adverse to the plaintiff, and that plaintiff have judgment quieting title against defendant and removing the cloud from plaintiff's title created by the pretended claim of defendant and his occupancy of said premises; that plaintiff be adjudged entitled to the immediate and exclusive possession of said premises and the whole and every part thereof and be put in possession thereof by order of this court.

IV. That plaintiff have such other and further relief as to this honorable court shall seem meet, proper, and agreeable to equity.

V. That plaintiff have and recover of and from defendant his costs and disbursements herein.

STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiff.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

H. M. Stephens, being first duly sworn, upon oath deposes and says that he is one of the attorneys for the above-named plaintiff in the above-entitled action, and makes this verification for and on behalf of said plaintiff, for the reason that said plaintiff is not now within either the county of Spokane or the county of Garfield, State of Washington; that affiant knows the contents of the foregoing amended complaint and the same is true, as he verily believes.

H. M. STEPHENS.

21 Subscribed and sworn to before me this 5th day of February, 1898.

E. T. WHITE,
[SEAL.] *Notary Public for the State of Washington,*
Residing at Spokane, Washington.

(Copy.)

(Indorsed:) Due service of the within-amended complaint by receipt of a true copy thereof admitted this 7th day of Feb'y, 1898. Ben. F. Tweedy, att'y for def't. Filed Feb'y 7, '98. A. E. Dickson, Co. clerk.

In the Superior Court for Garfield County and State of Washington.

J. M. MOORE, Plaintiff,
vs.
JOHN CARMODE, Defendant. } Demurrer to Complaint.

The defendant demurs to plaintiff's amended complaint for the reason—

That the amended complaint does not state facts sufficient to constitute a cause of action.

GOSE & KUYKENDALL AND
TWEEDY & JEWETT,
Attorneys for Defendant.

(Indorsed:) Filed Feb'y 19, '98. A. E. Dickson, Co. clerk.

22 In the Superior Court of the State of Washington for Garfield County.

J. M. MOORE, Plaintiff,
against
JOHN CARMODE and Others, Defendants.

On the — day of June, 1898, the demurrer of the defendants to the amended complaint was argued and submitted for the plaintiff by Ben. F. Tweedy and Mack F. Gose, Esquires, of counsel for the defendants, and by H. M. Stephens and James B. Kerr, Esquires, of counsel for the plaintiff, and was taken under advisement by the court; and now, on this 10th day of August, 1898, the court, being fully advised in the premises, sustains said demurrer, said pl'tiff, by his counsel, duly excepting thereto.

THOS. H. BRENTS, *Judge.*

(Indorsed:) Filed Aug. 15, 1898. A. E. Dickson, Co. clerk.

In the Superior Court of the State of Washington for Garfield County.

J. M. MOORE, Plaintiff,
vs.
JOHN CARMODE, Defendant. } Order.

The demurrer of the defendant to the amended complaint of plaintiff herein came on regularly for hearing and determination on the — day of ——, 1898, and plaintiff and defendant appearing by their respective attorneys, and after argument, and the court being fully advised in the premises, it is—

23 Ordered that said demurrer be, and the same was, sustained; which order has been heretofore entered by the court; whereupon plaintiff announces that he desires to stand upon his amended complaint and declined to further plead herein; whereupon the defendant moved the court for an order dismissing the action of plaintiff herein; which motion was granted by the court. Plaintiff excepted to the order and ruling of the court sustaining the demurrer, and also to the order and ruling of the court sustaining the motion of the defendant to dismiss the above-entitled action; which objections were, and they are hereby, allowed by the court.

Wherefore it is ordered and adjudged by the court that the above-entitled action be, and the same is hereby, dismissed at plaintiff's cost, and that defendant do have and recover of and from the plaintiff *their* costs and disbursements herein, taxed at — dollars; to all of which the plaintiff excepts and exception is allowed.

Done in open court this 18th day of July, 1898.

THOS. H. BRENTS, *Judge.*

(Indorsed.) Filed Aug. 27, '98. A. E. Dickson, Co. clerk.

In the Superior Court of the State of Washington for Garfield County.

J. M. MOORE, Plaintiff,
v.
JOHN CARMODE, Defendant. } Notice of Appeal.

24 To the above-named defendant, John Carmode, and to Messrs. Tweedy & Jewett and Gose & Kuykendall, your attorneys:

You and each of you are hereby notified that the above-named plaintiff does hereby appeal to the supreme court of the State of Washington from that certain order and final judgment rendered and entered herein on the 27th day of August, 1898, which order and final judgment is in favor of defendant and against plaintiff, and which said order and final judgment is one dismissing the action of plaintiff herein and for costs in favor of defendant and against plaintiff, and from the whole and every part of said order and final judgment.

Dated this 27th day of August, 1898.

STEPHENS & BUNN,
Attorneys for Plaintiff.

(Indorsed:) Due service of within notice by receipt of a true copy thereof admitted this 29th day of Aug., '98. Gose & Kuykendall, Tweedy & Jewett, att'ys for def't. Filed Aug. 29, '98. A. E. Dickson, Co. clerk.

In the Superior Court of the State of Washington for Garfield County.

J. M. MOORE, Plaintiff,
v.
JOHN CARMODE, Defendant. } Bond on Appeal.

25 Know all men by these presents that the undersigned, for and on behalf of the above-named plaintiff, does hereby bind himself, his heirs, executors, and administrators, unto the above-named defendant, John Carmode, in the sum of two hundred dollars ($200.00).

The condition of the above obligation is such that whereas the above-named plaintiff has appealed to the supreme court of the State of Washington from that certain order and final judgment made and entered in the above-entitled action on the 27th day of August, 1898, which said order and final judgment is in favor of defendant and against said plaintiff:

Now, therefore, if the said plaintiff (appellant) shall and will pay all costs and damages that may be awarded against him on the said appeal or on the dismissal thereof, not exceeding two hundred dollars, then and in that event this obligation to become null and void; otherwise to be and remain in full force and effect.

Dated this 29 day of August, 1898.

F. H. MASON.

(Copy.)

STATE OF WASHINGTON, } ss:
County of Spokane, }

F. H. Mason, being first duly sworn, upon oath deposes and says that he is the party who made and executed the above and foregoing bond for and on behalf of the above-named plaintiff and for the purpose of effecting and perfecting an appeal in the above-entitled action; that he is a resident of the county of Spokane, State of Washington, and is worth the sum of two hundred dollars over and above all debts and liabilities, in separate property within the State of Washington, exclusive of property exempt from execution.

F. H. MASON.

Subscribed and sworn to before me this 29th day of August, 1898.

E. T. WHITE,
Notary Public in and for said County and State,
Residing at Spokane, Washington.

(Copy.)

(Indorsed:) Filed Sept. 1, 1898. E. A. Dickson, Co. clerk.

26 In the Superior Court of the State of Washington for Garfield Co.

J. M. MOORE, Plaintiff,
vs.
JOHN CARMODE, Defendant. } Substitution of Attorneys.

We hereby consent to the substitution of Stephens & Bunn as attorneys for the plaintiff in the above-entitled action in our place and stead, and hereby withdraw our appearance herein.

Dated at Spokane, Washington, this 27th day of August, 1898.

STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiff.

To the above-named defendant, John Carmode, and to Messrs. Tweedy & Jewett and Gose & Kuykendall, your attorneys:

You will please take notice that Stephens & Bunn, the undersigned, have been substituted as attorneys for the plaintiff in the above-entitled cause in place of Messrs. Stoll, Stephens, Bunn & Macdonald, their consent being above set forth.

STEPHENS & BUNN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Spokane, }

E. T. White, being first duly sworn, upon oath deposes and says that he is over the age of twenty-one years; that Messrs. Stephens & Bunn, attorneys for the plaintiff in the above-entitled action, have their offices in the city of Spokane, State of Washington; that Messrs. Tweedy & Jewett are attorneys for the above-named defendant and have their offices in the city of Pomeroy, Washington; that

on this 27th day of August, 1898, affiant deposited in the
27 United States post-office at the said city of Spokane, Washington, a full, true, and correct copy of the above and foregoing substitution of attorneys, enclosed in a sealed envelope, postage prepaid, and addressed to said Messrs. Tweedy & Jewett, attorneys-at-law, at Pomeroy, Washington; that there is a daily mail service between the aforesaid city of Spokane, Washington, and the city of Pomeroy, Washington.

E. T. WHITE.

Subscribed and sworn to before me this 27th day of August, 1898.

H. M. STEPHENS,
[SEAL.] *Notary Public for the State of Washington, Residing at Spokane, Washington.*

J. M. MOORE, Plaintiff,
vs.
JOHN CARMODE, Defendant.

STATE OF WASHINGTON, *County of Garfield,* } *ss:*

I, A. E. Dickson, county clerk and clerk of the superior court in and for said county and State, do hereby certify that the foregoing and annexed are true, full, and correct copies of the amended complaint, demurrer to complaint, order on demurrer, order of dismissal, notice of appeal and bond on appeal, and substitute of att'ys, as the same now appear as of record in the files of said court in foregoing entitled action, now in my care, custody, and keeping.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 10th day of September, 1898.

A. E. DICKSON,
[SEAL.] *County Clerk and Clerk of the Superior Court in and for said County and State.*

28 (Indorsed:) Filed Oct. 7, 1896. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

29 J. M. MOORE, Appellant,
vs.
JOHN CORMODE, Respondent. } No. 3123.

Filed Dec. 5th, 1898.

The land in controversy in this case is within the indemnity limits of the grant to the Northern Pacific Railroad Company. In 1882 one Mrs. Standifird, a qualified settler, located upon the land, built a house, and made other improvements, and the defendant Cormode, by mesne conveyances, succeeded to her rights and now holds under homestead patent. The appellant is the grantee of the railroad company and brought this action to cancel the patent

issued to the respondent and to obtain possession of the land. A demurrer interposed by the respondent was sustained, and the appellant, electing to stand upon his complaint, has appealed from the judgment against him. The rights of the respective parties were previously contested in the Land Department through its successive stages and culminated in a decision in favor of the respondent by the Secretary of the Interior. The land was selected by the company January 5, 1884, at which time it was occupied by a qualified settler, as stated, and the Land Department affirmatively found that when the selection was made by the company the land was embraced in the *bona fide* settlement of Mrs. Standifird. When the appellant purchased from the company the case was pending before the Land Department.

Sections 3 and 6 of the act granting lands to aid in the construction of the railroad aforesaid, 13 Statutes at Large, p. 365, are the ones bearing especially upon the questions involved. The more material parts of section 3 are as follows:

"That there be, and hereby is, granted * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt * * * and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections:" * * *

Section 4 provides for the issuance of patents to the company upon the completion of each twenty-five consecutive miles of road, etc.

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price

less than two dollars and fifty cents per acre, when offered for sale."

Section 12 required an acceptance of the terms and conditions of the act by the company within two years after its passage.

Appellant contends that the land in controversy was withdrawn from sale, homestead, pre-emption, or other entry by the terms of the act aforesaid, and remained so from and after the date of filing the map of general route on Feb. 21, 1872, and that in addition to the statutory withdrawal the withdrawal orders of the Land Department segregated the premises from the public domain, and no right thereto could be acquired or initiated by the respondent or any one adverse to the company, so that the land was free and clear of all other rights and claims at the date of the selection by the company. Questions regarding the construction of the act have been before
31 the Supreme Court of the United States a number of times, but the matters at issue in such cases do not directly cover this case. It would be difficult to reconcile all that has been said in the discussion of the various cases cited, and we shall not undertake to consider them in detail. But taking a broad view of the question in considering the primary effect of the act as a matter of public policy, which is always permissible where there is room for construction and the true intent is a matter of doubt, we are of the opinion that there was no intention to withdraw from actual settlement the immense quantity of lands embraced within the indemnity limits. This phase of the matter has received consideration in a number of cases. Attention is called to the fact that it was expected when the law was enacted that the road would be speedily constructed, and that it would traverse, in the main, a practically unoccupied territory, and that there would be consequently no great loss of lands within the place limits. It might well have been considered that there would be ample lands within the indemnity limits to make good such losses, although these lands were open to settlement at all time prior to their actual selection. See N. P. R. R. Co. *v.* Musser, Sauntry, etc, 18 Sup. Ct. Rep., 205. And after a consideration of the numerous cases cited in the briefs we are of the opinion that the grant did not take effect as to any lands within the indemnity limits until actually selected by the company, and that prior thereto they were open to settlement. It has been the long-continued policy of the Government to facilitate the settlement of its unoccupied lands, and so great a restriction as this would have been under the company's contention could hardly have been contemplated. The departmental withdrawal was subsequently set aside and cannot operate to extend the provisions of the act. Those parts of the discussion or statements in some of the cases most relied upon by the appellant are not in har-
32 mony with the later expressions of the court, especially in N. P. R. R. Co. *vs.* Colburn, 164 U. S., 383, and N. P. R. R. Co. *vs.* Sanders, 166 U. S., 620. Also the prevailing and long-continued construction of the act by the Land Department is entitled to great weight in determining the questions raised. Many patents have been issued thereunder to settlers who are now occupying the

lands, as in this case, and doubtless frequent transfers have been made to others who have regarded the title as perfect, for the issuance of a patent is regarded by the common mind as conclusive, and if it is a matter of doubt the overturning of these rights and the construction of the Land Department should be reserved for the highest court in the land.

Furthermore, it is most strenuously insisted by the respondent that the case must be decided in his favor on the ground that it does not appear that there was any finding by the Land Department that there was any deficiency in place lands, and that under the familiar rule applied to judgments, if an affirmative finding that there was no loss of place limits was necessary, then that such finding would be presumed; that all presumptions are in favor of the regularity of the proceedings in the Land Department to sustain a patent. The appellant has undertaken to conclude this matter by averment in his complaint, and contends that the indemnity lands were appropriated without selection by reason of the deficiency in place limits, and that the court is bound by the allegations of the complaint in this particular. There is no allegation, however, that there was a finding by the Secretary of the Interior or in the proceedings before the Land Department that there was a deficiency in place limits, and it seems to us that to enable the company to claim this land there must have been a finding that there was a deficiency within the place limits for which the lands claimed were taken, or that it was conclusively established in the proceedings before
33 the department. This matter was a question of fact essentially within the jurisdiction of the Land Department, and its judgment should be sustained unless it appears that it is in conflict with the facts therein found or established. It may have been found that there was no deficiency entitling the company to select these lands. It was found that when the selection was made the land was occupied by a qualified settler, and the company therefore not entitled to take it. The contention of the appellant with reference to the allegations of the complaint in this respect are in our opinion overborne by the authorities.

Johnson *vs.* Drew, 18 Sup. Ct. Rep., 800.
Durango Land and Coal Co. *vs.* Evans, 80 Fed. Rep., 425.
Gale *vs.* Best, 78 Cal., 235.
New Dunderberg Min. Co. *vs.* Old *et al.*, 79 Fed. Rep., 598.

The judgment of the lower court is affirmed.

SCOTT, *C. J.*

We concur.
REAVIS, *J.*
DUNBAR, *J.*
GORDON, *J.*
ANDERS, *J.*

34 In the Supreme Court, State of Washington.

SATURDAY, *January* 14, 1899.

J. M. MOORE, Appellant,
v.
JOHN CORMODE, Respondent. } No. 3123. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of Garfield county and upon the argument of counsel, and the court being fully advised in the premises and having filed its opinion, in writing, it is now, on this 14th day of January, A. D. 1899, on motion of M. F. Gose, Esquire, of counsel for respondent, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is, affirmed with costs, and that the said John Cormode have and recover of and from the said J. M. Moore and from F. H. Mason, surety, the costs of this action, taxed and allowed at eighty-eight & $\frac{75}{100}$ dollars, and that execution issue to the said superior court for further proceeding in accordance with the opinion herein filed.

35 STATE OF WASHINGTON:

In the Supreme Court.

J. M. MOORE, Plaintiff in Error,
vs.
JOHN CORMODE, Defendant in Error.

Now comes the above-named J. M. Moore, plaintiff in error, and prays that a writ of error in the above-entitled cause may issue to the said supreme court of the State of Washington to review a certain judgment entered in said court on the 14th day of January, 1899, in favor of said John Cormode, defendant in error, and against the said J. M. Moore, plaintiff in error, and dismissing the complaint of the plaintiff in error, J. M. Moore, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of Washington, to the great damage of said plaintiff in error; all of which will more in detail appear from the assignment of errors which is filed with this petition.

J. M. MOORE,
Plaintiff in Error,
By C. W. BUNN,
JAMES B. KERR,
H. M. STEPHENS,
His Attorneys.

Dated February 23rd, 1899.

(Indorsed:) Filed Mar. 2, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

36 STATE OF WASHINGTON:

In the Supreme Court.

J. M. MOORE, Plaintiff in Error,
vs.
JOHN CORMODE, Defendant in Error.

Assignments of Error.

Now comes the above-named plaintiff in error, J. M. Moore, by C. W. Bunn, H. M. Stephens, and James B. Kerr, his attorneys, and assigns the following errors in the judgment of this court herein:

I.

The court erred in its judgment that the complaint of the plaintiff in error be dismissed.

II.

The court erred in its judgment sustaining the demurrer of the defendant in error to the complaint of the plaintiff in error herein.

III.

The court erred in its judgment wherein and whereby it decided that the plaintiff in error was not the owner of the land in controversy and was not entitled to recover possession thereof.

IV.

The court erred in its judgment wherein and whereby it decided that the plaintiff in error was not entitled to judgment canceling the patent of the defendant in error and adjudging plaintiff in error to be the owner of the premises in controversy.

V.

The court erred in its judgment wherein and whereby it decided that the patent of the United States issued to the defendant
57 in error conveyed to him the legal and equitable title to the premises in controversy.

VI.

The court erred in failing to hold and decide that the plaintiff in error was the owner and entitled to the possession of the premises in controversy under and by virtue of the conveyance to said plaintiff in error from the Northern Pacific Railroad Company.

VII.

The court erred in failing to hold and decide that the Northern Pacific Railroad Company became the owner of the premises in controversy by virtue of the act of Congress approved July 2, 1864, granting lands to aid in the construction of the Northern Pacific railroad.

VIII.

The court erred in failing to hold that the Northern Pacific Railroad Company became the owner of the premises in controversy by virtue of its selection thereof under said act of Congress of July 2, 1864.

IX.

The court erred in failing to hold and decide that the premises in controversy were public land of the United States, free from pre-emption or other claims or rights, and subject to the grant to said Northern Pacific Railroad Company under said act of Congress of July 2, 1864, at the date of selection, to wit, December 12th, 1883.

X.

The court erred in failing to hold that the selection of the premises in controversy by the Northern Pacific Railroad Company on December 12th, 1883, was in compliance with said act of July 2, 1864, and the directions of the Secretary of the Interior, and operated to appropriate said premises to said Northern Pacific Railroad Company under said grant.

38 XI.

The court erred in holding and deciding that the occupancy of the premises in controversy by Ora Standifird on the date of the selection thereof by the Northern Pacific Railroad Company constituted such a claim thereto as prevented the attachment of the grant to said Northern Pacific Railroad Company upon selection.

XII.

The court erred in failing to hold and decide that the premises in controversy were appropriated to and passed to the Northern Pacific Railroad Company upon the definite location of its road under said act of July 2, 1864, for the reason that all of the lands in the indemnity limits were insufficient to satisfy the losses from the place limits of its said grant.

XIII.

The court erred in failing to hold and decide that the premises in controversy were withdrawn from sale, homestead, and pre-emption entry by virtue of the provisions of said act of July 2, 1864, from and after February 21, 1872, when the general route of said Northern Pacific railroad was fixed.

XIV.

The court erred in failing to hold and decide that the premises in controversy were withdrawn from sale, homestead, and pre-emption entry by virtue of the provisions of said act of July 2, 1864, from and after October 4, 1880, when the line of said Northern Pacific railroad was definitely located.

XV.

The court erred in failing to hold and decide that the premises in controversy were withdrawn from sale, homestead, and pre-emption entry from and after November 13, 1880, by virtue of the withdrawal thereof by the Commissioner of the General Land Office.

XVI.

The court erred in failing to hold and decide that the Land
39 Department of the United States committed an error of law in awarding the premises in controversy to the defendant in error, and allowing homestead entry thereof, and in cancelling the selection of the Northern Pacific Railroad Company.

XVII.

The court erred in holding that the patent issued to the defendant in error concluded and determined the rights of the parties herein.

J. M. MOORE,
By C. W. BUNN,
JAMES B. KERR,
H. M. STEPHENS,
His Attorneys.

Dated February 24th, 1899.

(Indorsed:) Filed Mar. 2, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

40 Know all men by these presents that we, Howell W. Peel and R. L. Rutter, of the city of Spokane, county of Spokane, State of Washington, are firmly bound unto John Cormode, of the county of Garfield, in the State of Washington, in the full and just sum of two hundred and fifty (250) dollars, to be paid to the said John Cormode, his heirs, representatives, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, in the supreme court of the State of Washington, in a suit pending in said court between J. M. Moore, plaintiff, and John Cormode, defendant, judgment was rendered against the said plaintiff, J. M. Moore, and the said plaintiff having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid cause, and the citation directed to the said John Cormode, defendant, citing and admonishing him to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, on or before the first day of May, 1899:

Now, the condition of the above obligation is such that if the said J. M. Moore shall prosecute said writ of error to effect and answer

all damages and costs if he shall fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

HOWELL W. PEEL. [SEAL.]
R. L. RUTTER. [SEAL.]

Sealed and delivered in presence of—
E. T. WHITE.
H. M. STEPHENS.

41 STATE OF WASHINGTON, } ss:
County of Spokane, }

Howell W. Peel and R. L. Rutter, being first duly sworn, each for himself, and not one for the other, deposes and says:

That he is one of the parties who made and executed the above and foregoing bond for and on behalf of J. M. Moore, plaintiff in error in the cause mentioned therein, and for the purpose of effecting and perfecting a writ of error therein; that he is a resident of the county of Spokane, State of Washington, and is worth the sum of two hundred and fifty (250) dollars over and above all debts and liabilities, in separate property within the State of Washington, exclusive of property exempt from execution.

HOWELL W. PEEL.
R. L. RUTTER.

Subscribed and sworn to before me this 24th day of February, 1899.

E. T. WHITE,
Notary Public in and for the State of Washington,
[SEAL.] *Residing at Spokane, Washington.*

The foregoing bond is approved as to form and sufficiency.

MERRITT J. GORDON,
Chief Justice of Supreme Court of Washington.

(Indorsed:) Filed Mar. 2, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

42 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in a suit between J. M. Moore, plaintiff, and John Cormode, defendant, wherein was drawn in question the validity of a statute or an authority exercised under the United States and the decision was against its validity, a manifest error hath intervened, to the great damage of the said J. M. Moore, as by his complaint appears, we, being willing that error, if any hath been, shall be duly corrected

and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 2nd day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.

The above writ is hereby allowed.

MERRITT J. GORDON,
Chief Justice of Supreme Court of Washington.

43 [Endorsed:] 3123. In the supreme court, State of Washington. J. M. Moore, plaintiff in error, *vs.* John Cormode, defendant in error. Writ of error. Stephens & Bunn, attorneys for plaintiff. Filed Mar. 3, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

44 United States of America to John Cormode, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Washington, wherein J. M. Moore is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Merritt J. Gordon, chief justice of the supreme court of the State of Washington, this second day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

M. J. GORDON,
Chief Justice of the Supreme Court of Washington.

45 STATE OF WASHINGTON, } ss:
County of Garfield, }

S. S. Russell, being first duly sworn, upon oath deposes and says:

That he is the duly elected, qualified, and acting sheriff of Garfield county, State of Washington.

That he served the within citation upon the within-named defendant, John Cormode, by delivering to & leaving with him, personally, in Garfield county, a true copy of said citation, certified by affiant to be such true copy.

Affiant further certifies that he served the said citation upon the attorneys for the above-named defendant by delivering to and leaving with Messrs. Gose & Kuykendall, in Garfield county, a true copy of said citation, certified by affiant to be such.

Affiant further certifies that said service was made on said defendant and on his said attorneys on the 9th day of March, A. D. 1899, within the county of Garfield, State of Washington, and that said Cormode is the defendant mentioned in said citation.

S. S. RUSSELL.

Subscribed and sworn to before me this 10th day of March, A. D. 1899.

{Seal of Ben. F. Tweedy, Notary Public, State of Washington. Commission expires Sept. 6, 1901.}

BEN. F. TWEEDY,
Notary Public in and for the State of Washington,
Residing at Pomeroy, said State.

46 [Endorsed:] 3123. In the supreme court, State of Washington. J. M. Moore, plaintiff in error, *vs.* John Cormode, defendant in error. Citation. Stephens & Bunn, attorneys for plaintiff. Filed Mar. 13, 1899. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

47 In the Supreme Court, State of Washington.

J. M. MOORE, Plaintiff,
v.
JOHN CARMODE, Defendant. } Certificate, Clerk of Supreme Court.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above-entitled cause, and that in pursuance of the writ of error filed herein I now transmit the same, together with the original writ of error, the original citation, and a copy of the bond on appeal and of the assignment of errors, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 14th day of April, 1899.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

[Ten-cent U. S. internal-revenue stamp.]

Endorsed on cover: File No., 17,395. Washington supreme court. Term No., 285. J. M. Moore, plaintiff in error, *vs.* John Cormode. Filed May 4th, 1899.

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 285.

J. M. MOORE,
Plaintiff in Error,

vs.

JOHN CARMODE,

ARGUMENT FOR PLANTIFF IN ERROR.

This case is before the court on a writ of error directed to the supreme court of Washington. The action was commenced in the superior court of Garfield county, Washington, to cancel a patent issued under the preemption law to the defendant John Carmode, purporting to convey the northwest quarter (N. W. ¼) of section three (3), township thirteen (13), range forty-two (42) east of the Willamette meridian, a tract of land situated within the indemnity limits of the Northern Pacific grant.

The title of the plaintiff is derived by purchase

from the Northern Pacific Railroad Company under its grant by act of July 2, 1864, (13 Stat. 365).

The supreme court of Washington sustained a demurrer to the complaint and entered judgment dismissing the action. The complaint alleges that by the third section of the act of congress approved July 2, 1864, lands were granted to the Northern Pacific Railroad Company as follows:

"*And be it further enacted,* That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." (Transcript, p. 1).

It is then alleged that on October 4, 1880, the

railroad company definitely located that portion of its road extending from the city of Spokane, Washington, to Wallula, Washington, by transmitting to the secretary of the interior a map of the definite location of that portion of its road, and that this map was, on October 4, 1880, approved by the secretary of the interior and by him caused to be filed in the office of the commissioner of the general land office (Transcript, p. 5). That upon definite location the land in controversy fell within the 40-50 mile or indemnity limits of the grant (Transcript, p. 6). That upon the filing of the map of definite location the commissioner of the general land office, acting under the directions of the secretary of the interior, withdrew from sale, homestead and preemption entry, all the odd-numbered sections situated within the indemnity limits opposite the portion of the line so located. The order of withdrawal was received at the district land office at Walla Walla on November 30, 1880 (Transcript, p. 6).

It is alleged that the land in controversy was, at the date of the grant, at the date of definite location and at the date of withdrawal, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights, and was, and is, non-mineral (Transcript, p. 6).

It is alleged that prior to the year 1885, the Northern Pacific Railroad Company definitely located the whole of its main and branch lines, and that the same were constructed prior to the year

1888 and examined by commissioners and approved by the president of the United States, as provided by section 4 of the act of July 2, 1864 (Transcript, p. 7).

It is further alleged that at the respective dates of definite location of the various portions of said railroad, the total area of lands lost from the primary limits of the grant exceeded the total area of lands in the indemnity limits subject to selection (Transcript, pp. 7-8).

It is further alleged that on December 12, 1883, the Northern Pacific Railroad Company, under the direction of the secretary of the interior, selected the lands in controversy and filed its selection list in the district land office at Walla Walla, Washington, and paid the fees required by law; that thereafter, and on October 26, 1887, in compliance with certain directions of the secretary of the interior, issued subsequent to the selection, the railroad company specified the losses in lieu of which the lands in controversy had been selected. It is alleged that the lost lands so specified were within the primary limits of the grant and were excepted therefrom (Transcript, pp. 8-9).

It is further alleged that on July 2, 1895, the Northern Pacific Railroad Company, by warranty deed, conveyed to the plaintiff the lands described in the complaint (Transcript, p. 9).

It is alleged that on July 17, 1890, the defendant John Carmode presented a preemption declaratory statement for the land in controversy at the district land office at Walla Walla, Washington,

alleging that one Mrs. Ora Standiford settled on the land in March or April, 1882, and that she and certain subsequent purchasers of her improvements resided thereon until 1889 when the defendant Carmode purchased the improvements and moved on to the land. Thereupon a hearing was ordered before the district land officers to determine the status of the land at the date of selection by the railroad company. The decision of the register and receiver upon this hearing was that by reason of the occupation of the premises by Mrs. Standiford at the date of selection and the subsequent purchase of her improvements by the defendant, the railroad company's selection should be canceled and the defendant's application should be allowed. This decision was rendered in 1891 (Transcript pp. 10-11).

Upon appeal by the railroad company to the commissioner of the general land office, that officer recited the facts as above set forth, that the land was occupied by Mrs. Standiford at the date of selection, that she sold her improvements in 1885 to John A. Long, who was succeeded by his brother Henry W. Long, in 1888; that the defendant Carmode purchased these improvements in 1889 and went into occupation of the premises. Upon these facts and upon the sole ground that the land was occupied at the date of the railroad company's selection by Mrs. Standiford, who was qualified to enter public land, but who never offered a filing for the land in question, the commissioner canceled the selection (Transcript, pp. 10-11). This decision

was rendered April 25, 1895. The railroad company thereupon appealed to the secretary of the interior, and that officer affirmed the decision of the commissioner upon the grounds above stated. The decisions of the commissioner and the secretary are set out at length in the complaint (Transcript, pp. 10-12).

It is further alleged that, in accordance with the decision of the secretary of the interior, final proof was offered by Carmode, and on May 2nd, 1898, a patent was issued to him purporting to convey title to the premises in question under the preemption law (Transcript, p. 12).

The complaint alleges that the officers of the land department committed an error of law in cancelling the selection of the railroad company and issuing the patent to the defendant Carmode, and it is prayed that the patent be canceled and that the defendant be decreed to hold in trust for the plaintiff any title acquired by virtue of the patent, and that the plaintiff be adjudged entitled to the possession of the premises.

To this complaint the defendant interposed a demurrer, specifying as a ground therefor that the complaint does not state facts sufficient to constitute a cause of action (Transcript, p. 13).

The supreme court of Washington sustained the demurrer, affirming the judgment of the superior court for Garfield county, and dismissed the action. The opinion is reported in 20 Washington, 305, and printed in the transcript at page 17.

ASSIGNMENT OF ERRORS.

Errors are duly assigned in the record (Transcript, pp. 22-24) but may be briefly stated, as follows:

I.

The court erred in sustaining the demurrer to the complaint and in entering judgment dismissing the action.

II.

The court erred in holding that the patent issued to the defendant is conclusive of the rights of the parties.

III.

The court erred in holding that no rights were acquired by virtue of the selection of the premises under act of congress approved July 2, 1864.

IV.

The court erred in holding that the settlement of Ora Standiford excepted the land in controversy from the grant to the Northern Pacific Railroad Company.

V.

The court erred in holding that the withdrawal of the land in controversy was void.

VI.

The court erred in failing to hold that the title of plaintiff was initiated prior to the title of defendant.

VII.

The court erred in denying plaintiff's title to the land in controversy claimed under the act of congress approved July 2, 1864.

MERE OCCUPATION WAS INSUFFICIENT TO DEFEAT THE GRANT.

It appears from the decisions of the commissioner of the general land office and the secretary of the interior, set out at length in the complaint, that the selection of the railroad company was canceled upon the sole ground of the occupancy of the premises by Ora Standiford at the date of selection. It appears from these decisions that Mrs. Standiford settled on the land in March or April, 1882, but never made any application to enter the land.

It is submitted that the law was settled by this court in *Northern Pacific Railroad Company v. Colburn,* 164 U. S. 383, that mere settlement without a filing or entry creates no claim within the meaning of the Northern Pacific grant.

In that case Colburn sued the Northern Pacific Company to recover a sum of money paid by him as contract price on a tract of land sold to him by

the company, alleging that the company had no title to the land and that it was excepted from the grant. The company answered, alleging that, at the date of the grant and the date of definite location when its rights attached, the records of the land office showed no preemption, homestead or other claims or rights; but admitted that at the date of definite location one Kelly was occupying and cultivating the land, but that he made no entry or filing in the local land office. The supreme court of the state (Montana) sustained the demurrer to the answer, on the ground that it appeared that the land department had held the tract to be excepted from the grant. Mr. Justice Brewer, delivering the opinion of the court, said:

"In this we think the learned court erred. The facts set up in the answer in reference to the land grant, the filing of the map of the line of general route and also that of definite location, the situation of the land and its freedom from record claims, were such as to prima facie vest a title in the company. It is true, it is also disclosed by the answer that one Kelly was in occupation, or at least cultivating the land at the time of the filing of the map of definite location, and the decision of the land department as to that fact undoubtedly concludes both parties. And if it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location unaccompanied by any filing of a claim in the land office, then or thereafter, excludes the tract from the operation of the land grant, the decision of the supreme court of Montana was right. But frequent decisions of this court have been to the effect that no preemption or homestead claim attaches to a tract until an entry in the local land office. Thus in the case of *Kansas Pacific Railway v. Dunmeyer*, 113 U. S. 629, 644, Mr. Justice Miller,

speaking for the court, said:

"'Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into a perfect title by future residence and cultivation.'

"This language was quoted and the decision reaffirmed in *Hastings & Dakota Railroad v. Whitney*, 132 U. S. 357; *Whitney v. Taylor*, 158 U. S. 85. In *Lansdale v. Daniels*, 100 U. S. 113, 116, it was ruled that 'such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that the settlement alone is not sufficient for that purpose.' See also *Maddux v. Burnham*, 156 U. S. 544. Now, in this case the allegations are that Kelly never made any entry in the local land office and the decision of the secretary of the interior is based simply on the fact of occupation and cultivation. And while the decision of that fact may be conclusive between the parties his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties and which is open to review in the courts."

And in conclusion said further: "For the reasons above indicated, because the decision of the land department was only on matters of fact and did not include the law in the case, and as such *facts so found were not of themselves sufficient to disturb the title of the railroad company*, the judgment is reversed and the case remanded to the supreme court of the state for further proceedings not inconsistent with this opinion."

Counsel for defendant urges with much earnestness that the question of the effect of mere occupancy was not presented in the Colburn case. The language of the opinion seems too plain to justify argument upon this contention, but it may be observed in reply that the suggestion finds a conclusive answer in the denial by the court of the motion to dismiss for the lack of a federal question. The answer of the railroad company to the complaint of Colburn set up facts showing the land was free and clear at definite location, admitting the occupancy of Kelly. Upon these facts the state court denied the title claimed by the company under the federal grant. This court held that the effect of Kelly's settlement presented a federal question and held further that the effect of the occupancy was not to defeat the grant.

And this is the construction of the opinion upon which the interior department has acted since the decision was announced.

Wight v. Central Pacific R. R. Co., 27 L. D. 182; *Central Pacific R. R. Co. v. Hunsaker*, 27 L. D. 297; *Union Pacific R. R. Co. v. Grant*, 28 L. D. 18; *Union Pacific R. R. Co. v. Fisher*, 28 L. D. 75, 83.

The supreme court of Minnesota has also acted upon this plain construction of the Colburn case. *McHenry v. Nygaard*, 72 Minn. 2.

Finally, it is clear that the defendant Carmode acquired no rights by virtue of the purchase from Long of the improvements originally made by Ora Standiford. Mrs. Standiford had no rights which

she could transfer. *Quinby v. Conlan*, 104 U. S. 420.

THE WITHDRAWAL.

It appears by the complaint that the officers of the land department committed a further error of law in canceling the selection of the railroad company and allowing the entry of the defendant, for the reason that during the whole period of the occupation of the premises by Mrs. Standiford and the defendant claiming under her the land was withdrawn from preemption and homestead entry.

If the lands were withdrawn up to the time of the selection by the railroad company, no rights could be acquired under the public land laws which would defeat the selection. Sections 2257 and 2258 of the Revised Statutes of the United States provide what lands shall be subject to the right of preemption, and what lands may not be acquired in this manner. These sections are as follows:

Section 2257: "All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of preemption, under the conditions, restrictions, and stipulations provided by law."

Section 2258: "The following classes of lands, unless otherwise especially provided for by law, shall not be subject to the rights of preemption, to-wit:

First: *Lands included in any reservation by*

any treaty, law, or proclamation of the president, for any purpose.

Second: Lands included within the limits of any incorporated town, or selected as the site of a city or town.

Third: Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

Fourth: Lands on which are situated any known salines or mines."

Lands withdrawn from entry by order of the commissioner of the general land office are lands included in a reservation by "proclamation of the president" and fall within the first exception to section 2258 supra. *Wolsey v. Chapman*, 101 U. S. 755, 769.

It is well settled that where the executive officers of the government attempt to dispose of lands under the preemption law which fall within these exceptions, they act beyond their jurisdiction and their acts are void, and a patent issued upon an entry of land not subject to the jurisdiction of the land department does not pass the legal title and such a patent may be challenged in an action at law. This was the conclusion reached in *Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321.

This was an action of ejectment brought to recover possession of certain islands in the Mississippi river and within the corporate limits of the city of Minneapolis. The plaintiff relied upon a patent of the United States, purporting to convey

the land in question, based upon a soldier's additional homestead entry. The patent was dated June 13, 1884, and the plaintiff's right was initiated March 27, 1883, on which latter date he applied to enter the land in question. The land department allowed the entry and issued patent, and it was insisted at the trial, upon the part of the plaintiff, that the determination by the land department that the land in question was subject to entry at the date when the patentee's right was initiated was conclusive. The court conceded that where the patentability of public lands depends upon questions of fact which are committed to the consideration and determination of the land department, such determination is final, as, for instance, the determination by the department that a certain tract is swamp land or saline land or mineral land. The court says, however:

"But it is also equally true that when, by act of congress, a tract of land has been reserved from homestead and preemption or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in patent, transfer no title and may be challenged in an action at law. In other words, the action of the land department cannot over-ride the expressed will of congress, or convey away public land in disregard or defiance thereof."

The court therefore held that the patent was void and the plaintiff could not recover.

It follows, therefore, in the case at bar that if the land in controversy was withdrawn up to the date of the selection by the railroad company, and

during the whole period of the defendant's settlement, and when the defendant tendered his preemption declaratory statement, neither the occupation of the defendant, nor his filing, made after selection, could operate to defeat the grant.

But it is contended by the defendant that the order of the commissioner of the general land office of November 30, 1880, was void and ineffective to reserve the land from preemption. This was the view taken by the officers of the land department.

Before considering the question of the authority of the commissioner of the general land office to order a withdrawal of indemnity lands for the benefit of the Northern Pacific Railroad Company, it will be proper to consider generally the authority of the land department over the public domain and the authority of its officers to withdraw from the operation of the general land laws of the United States lands otherwise open to acquisition under those laws.

The question was first squarely presented to this court in *Wolcott vs. Des Moines Co.*, 5 Wall. 687. In this case the following facts appeared:

By act of congress, August 8, 1846, there was granted to the then territory of Iowa:

"For the purpose of aiding said territory *to improve the navigation of the Des Moines river from its mouth to Raccoon Fork*, so called, in said territory, one equal moiety in alternate sections, of the public lands, in a strip five miles in width on each side of said river."

It appeared that the Des Moines river flows from the northern boundary of Iowa and empties into

the Mississippi river at the southeast corner of the state, and receives the waters of the Raccoon Fork about the middle of the state.

The extent of the land grant under this act was the subject of continuous conflict of opinion. For a time it was held by the officers of the land department that the grant extended the full length of the Des Moines river in the territory, and then that it extended only to the mouth of the Raccoon Fork. The courts were also divided upon the question until the latter construction was finally placed upon the act by this court in *Railroad Company vs. Litchfield*, 23 Howard, 66.

By the terms of the grant, the lands inuring to the territory were to be selected subject to the approval of the secretary of the treasury and, under the construction of the act that the grant extended above the Raccoon Fork, thousands of acres so situated were patented under the grant and all of the odd numbered sections within five miles of the river above Raccoon Fork were withdrawn. Then came the decision by this court, holding that the grant did not extend above Raccoon Fork.

The validity of the executive order of withdrawal of the odd numbered sections above the Fork was presented in this wise: May 15, 1856, congress passed an act granting to the state of Iowa to aid in the construction of certain specified railroads, every alternate section (designated by odd numbers) for six sections in width on each side of said roads, with the following proviso:

"That any and all lands heretofore reserved to

the United States by any act of congress, or *in any other manner by competent authority, for the purpose of aiding in any objects of internal improvement, or for any purpose whatsoever, be, and* the same is hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands. * * * * *"*

It was contended that this grant to the state for the benefit of the railroads passed title to the lands covered by the executive withdrawal above Raccoon Fork. It was admitted that these lands passed unless excluded by the proviso. The court sustained the validity of the withdrawal, and said:

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory; as we have seen they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the president and cabinet; beside, if this power was not competent, *which we think it was* ever since the establishment of the land department, and which has ben exercised down to the present time, the grant of the 8th of August, 1846, *carried along with it by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated.* Hence immediately upon a grant being made by congress for any of these public purposes to a state, notice is given by the commissioner of the land office to the registers and receivers to stop all

sales either public or by private entry. Such notice was given the same day the grant was made in 1856 for the benefit of these railroads. That there was a dispute existing as to the extent of the grant in 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

To the same effect is *Wolsey vs. Chapman,* 101 U. S., 755.

The precise question here presented of a patent issued upon an attempted pre-emption of land covered by an executive withdrawal was considered in *Riley vs. Welles,* 154 U. S., 578.

In that case the same withdrawal as that considered in the two cases last above cited was before the court and it appeared that the defendant had applied to enter the land in controversy under the pre-emption law and that a patent had issued to him. The court held the allowance of the entry and the issuance of the patent to be acts done in violation of law. See also *Wood vs. Beach,* 156 U. S., 359; *Spencer vs. McDougal,* 159 U. S., 62; *Musser-Sauntry, Etc., Co. vs. Northern Pacific Rd. Co.,* 168 U. S., 604.

In the case at bar the decisions of the commissioner of the general land office, and of the secretary of the interior, allowing defendant's entry notwithstanding the withdrawal of the indemnity lands, are based upon the previous decisions of the secretary in the cases of *Northern Pacific Railroad Company vs. Guilford Miller,* 7 Land Decisions 100 and *Jennie L.*

Davis vs. Northern Pacific Railroad Company, 19 Land Decisions 87.

In his decision in the Guilford Miller and Davis cases the secretary questions the general authority of the executive officers of the government to make orders of withdrawal, the decisions of this court on the subject being passed over without mention. This question, however, must be considered as settled.

The secretary finally concludes in these cases that the order withdrawing from the operation of the general land laws lands in the indemnity belt of the Northern Pacific grant was void and without effect to reserve these lands from pre-emption and bases his conclusions on two grounds:

First: That the legislative withdrawal under the provisions of section 6, the act of July 2, 1864, of lands within forty miles of the line of the road, upon filing of the map of general route, was intended by congress to be exclusive of any authority in the land department to withdraw lands in the indemnity belt after definite location.

Second: That section 6 contains in express terms a prohibition against the withdrawal of indemnity lands by executive authority.

IS THE LEGISLATIVE WITHDRAWAL EXCLUSIVE?

The language of the sixth section of the granting act, operating to effect a preliminary withdrawal of all odd numbered sections of land within forty miles of the line of general route, is passed on in *Buttz vs. Northern Pacific Railroad Company,* 119 U S. 55, as follows:

"The sixth section declares that after the general route shall be fixed, the president shall cause the land to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road and that the odd sections granted shall not be liable to sale, entry or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith and information thereof given in the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

And immediately following, in the same opinion, the court declares the purpose of this preliminary legislative withdrawal:

"The object of the law in this particular is plain, it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is by virtue of these provisions, so construed by this court, that the secretary of the interior concludes that it was the intention of congress that no withdrawal of indemnity lands should be made after the definite location of the road. He says:

"Congress, the supreme power, having thus or-

dered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority and that its action on that behalf is intended to be exhaustive." (19 L. D. p. 89).

The secretary loses sight not only of the particular purposes for which this withdrawal on general route was provided, but of the intent of the whole act as apparent from its liberal terms and also a consideration of the circumstances under which the grant must be adjusted and which congress must have anticipated.

The preliminary withdrawal was for the purpose of securing the company between the time of filing its map of general route and its map of definite location. It was, of course, in contemplation that the general route of the road would be located within a comparatively short time after the passage of the granting act, but that it would require a much longer period to complete the explorations and accurate surveys necessary to a final definite location of the line. This in fact, turned out to be the case, for, although the maps of general route were filed in 1870, 1872 and 1873, the final maps of definite location were not filed until 1884. The preliminary withdrawal of forty miles on each side of the line of general route provided by congress to remain in force up to the time of definite location, was amply sufficient to substantially secure the rights of the company during that period. The line of the road being only approximately determined by the map of general route, lands in the indemni-

ty belt not then ascertained as such would have a speculative value, at the most, very remote, and the rush of settlers to appropriate these lands, induced by the prospect of a railroad and the consequent development of the country, could not have been looked for until the date of the definite location, when, for the first time, their proximity to the railroad would be assured.

It is submitted that this preliminary legislative withdrawal, instead of evidencing an intention on the part of congress that this exercise of the power of withdrawal should be exclusive, shows a disposition to protect the company in its full rights under the grant. As before stated, the withdrawal on general route was ample to protect the company up to the time of the definite location of its line, when its present grant of lands in place took effect and the limits of its indemnity belt became fixed. When this point was reached the function of the withdrawal on general route was fulfilled and at the same time by the terms of the grant, the right of selection of indemnity arose, the direction of which was expressly committed to the secretary of the interior. It is important to observe that without the withdrawal, the validity of which is here in issue, the right of selection would have been a barren right. By the act of June 2, 1862 (12 Stat. 413), the right of pre-emption was extended to all unsurveyed lands as well as surveyed lands, and, but for the executive withdrawal, the entire indemnity belt of the company's grant would have been subject to appropriation for a long period of time

during which the company could have made no selection. The right of selection by the terms of the act creating it, was limited to odd numbered sections and until the indemnity lands were surveyed, the odd numbered sections must remain unascertained.

It seems plain that no intention on the part of congress to curtail the powers of the executive in respect to this particular grant, exercised without question in a score of other cases, can be predicted on the provision of section six creating a legislative withdrawal from the location of the general route to the time of definite location. Substantial, and indeed conclusive, evidence of this view is found in the joint resolution of May 31, 1870 (10 Stat. 378), amendatory of and supplemental to the original granting act of July 2, 1864. By the joint resolution of 1870, the company was given the right in any state or territory to select odd numbered sections of land within ten miles beyond the limits prescribed in the act of 1864, in lieu of lands lost from the grant betwen the date of the act, July 2, 1864, and the date of definite location.

It is inconceivable that congress would create a right of selection by the act of 1864, which we have shown was a barren right, without the usual protection of an executive withdrawal, and six years later, by an act amendatory of the original granting act, give such plain evidence of its intention that the company should enjoy to the full extent

the benefits conferred and intend that its first provision for indemnity should be a nullity.

In construing this grant in *Northern Pacific R. R. Co. vs. St. Paul, Minneapolis & Manitoba R. R. Co.*, 26 Fed. 551-554, Mr. Justice Brewer, sitting at circuit, indicates the rule which must control its construction, that the conditions apparent to congress at the time of its passage must be kept in view. He says:

"While the grant is vast, the line to be constructed in order to earn it, is continental. The grant was made because congress believed the public good required the road, and, in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it is *fairer to presume that congress intended the freest bounty rather than to believe* that it burdened the grant with extra exceptions which when construction became feasible might largely deplete it of value."

Referring again to the case of *Wolcott vs. Des Moines River Co.*, 5 Wall. 687, it will be observed that the court says that the granting act there under consideration, *"carried along with it, by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated."*

A careful examination of the act in question (August 8, 1846, 9 Stat. 77) discloses that the provision referred to by the court was the requirement that the lands granted should be selected by an agent of the territory, "subject to the approval of

the secretary of the treasury of the United States."

Place this provision side by side with the provision of section three of the Northern Pacific granting act, giving the right of indemnity, which is as follows: "Other lands shall be selected by said company in lieu thereof, *under the direction of the secretary of the interior,*" and the conclusion follows that the Northern Pacific grant carried with it not only the power but the duty to reserve the indemnity lands for the benefit of the company.

The proposition laid down by the secretary of the interior where he says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive," meets with a conclusive answer in the case of *Wood vs. Beach*, 156 U. S. 549.

In this case Wood attempted to acquire land as a homestead which was within the indemnity limits of the grant to the Leavenworth, Lawrence & Galveston Railway Company, and also within the like limits of the grant to the Missouri, Kansas & Texas Railway Company. The land had been withdrawn under both grants by departmental orders prior to the settlement of Wood. After citing, with approval, the Des Moines River case, the court say of the withdrawals for the benefit of the railroad companies:

"These withdrawals were not merely executive acts, but the latter one, at least, was in obedience

to the direct command of congress. Section 4 of the act granting lands to aid in the construction of what is now known as the Missouri, Kansas & Texas Railway (14 Stat. at Large, 290) is as follows:

"'Sec. 4. And be it further enacted, that as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of the said secretary to withdraw from the market the lands granted by this act in such manner, as may be best calculated to effect the purposes of this act and subserve the public interests'."

The grant for the benefit of the Missouri, Kansas & Texas road was a place grant of the odd numbered sections within ten miles on each side of the line of road with a right of indemnity selection within twenty miles. The withdrawal thus sustained by this court was of indemnity lands.

Section 6 of the grant to the Northern Pacific Railroad Company provides that, after filing the map of general route, "the odd sections of land hereby granted shall not be liable to sale, entry or pre-emption." This is the congressional withdrawal which the secretary of the interior insists must be held to be exclusive of any withdrawal by a subordinate authority.

But in *Wood vs. Beach*, a direction to the secretary to withdraw from market "the lands granted by this act," was held not to exclude his authority to withdraw indemnity lands. If it be contended that indemnity lands are "lands granted," then the land in controversy in this case was withdrawn

by virtue of the provisions of section 6 above noted, but if indemnity lands are not "lands granted," then a statutory withdrawal of granted lands does not exclude the authority of the executive to withdraw indemnity lands.

DOES SECTION SIX PROHIBIT A WITHDRAWAL BY EXECUTIVE ORDER?

As before stated, the secretary places his decision, holding the withdrawal in question void, on two grounds. The first ground alleged has been discussed.

The second ground is that section six of the act of July 2, 1864, contains in express terms a prohibition against withdrawal of indemnity lands by the executive. The language construed to contain this prohibition is that which is printed in italics in the following quotation of section 6:

"Sec. 6. And be it further enacted, That the president of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, *and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road*

when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

It is declared by the secretary, that the provisions extending the pre-emption law and the homestead law to all other lands on the line of said road when surveyed, forbids the executive from withdrawing from the operation of the pre-emption and homestead laws any lands lying in the indemnity limits of the grant as determined by the map of definite location. An examination, however, of the pre-emption law as then in force, and a reading of this particular portion of the granting act in connection with that law, will show almost to a demonstration that the construction contended for is not only unreasonable but impossible. The pre-emption law of September 4, 1841 (5 Stat. 453), in section 10, after declaring the qualifications and conditions for acquiring public lands by pre-emption and extending the operation of the act to all *surveyed* lands, proceeds to define certain classes of land to which the pre-emption right shall not extend, including land reserved for the support of schools, lands included within the corporate limits of towns, lands on which are situated salines or mines, and further in terms as follows:

"No section of land reserved to the United States as alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement."

This exception of sections reserved to the United States alternate to others granted for the construction of canals, railroads or other public improvements, remained in force until March 3, 1853. At that time the following statute was enacted (10 Stat. 244):

"An act to extend pre-emption rights to certain lands therein mentioned.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,

"That the pre-emption laws of the United States as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same, in soldier's bounty land warrants estimated at a dollar and twenty-five cents per acre, or in gold and silver or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction: *Provided,* that no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve such lands prior to the final allotment of the alternate sections to such railroads by the general land office. *And provided further,* that the price to be paid shall in all cases be two dollars and fifty cents per acre or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres; *and provided further,* that any settler who has settled, or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by

the supreme court of the United States to be invalid, shall be entitled to all the rights of pre-emption granted by this act and the act of fourth of September, eighteen hundred and forty-one, entitled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights, after the lands shall have been released from reservation in the same manner as if no reservation existed." Approved March 3, 1853.

The effect of this act was to modify materially the restrictive clause in the act of 1841 withholding from the operation of the pre-emption law sections reserved to the United States, alternate to others granted for the construction of railroads and other public improvements. The plain reading of the act of March 3rd, 1853, shows that its effect was to remove the restriction contained in the pre-emption law of 1841, as to sections alternate to railroad lands from the passage of the act up to the time of "final allotment of the alternate sections to such railroads by the general land office." The act was so construed by the rules of the general land office quoted below (1 Lester, p. 509):

"SYNOPSIS OF RULES ADOPTED BY THE GENERAL LAND OFFICE FOR THE RAILROAD DESK.

"First: By the act of 4th September, 1841 (No. 48). 'No sections of land reserved to the United States, alternate to other sections, granted to any of the states, for the construction of any canal, railroad, or other public improvement,' are subject to the operation of said act. But—

"Secondly: The act of 3rd March, 1853 (No.

222), and Act of 27th March, 1854 (No. 234), materially modify the restrictive or interdictive clause in the Act of 1841. The act of March 3d, 1853, steps in and partly takes off the inhibition contemplated in Act of 1841 by extending the pre-emption laws, at a price of $2.50 per acre, 'over the alternate reserved sections of public lands along the lines of the railroads of the United States,' *where the party had settled and improved the land 'prior* to the *final allotment* of the alternate sections to such railroads, by the General Land Office.'

"Pre-emptions under this Act of 1853, attach within the following periods, to the *United States reserved sections*: 1. Form the date of the 'definite location' of the road (viz., according to the Attorney General's opinion, February 16, 1857), *when the route is surveyed and staked off on the ground*, until the 'final allotment,' by the General Land Office, of the railroad sections, and that is the *date of official list* certifying the latter sections to the State.

"We take the 'definite location' of the route as the period when this Act of 1853, with its $2.50 price applies, for the reason, not only that such seems to be the current of official decisions, but because, up to such 'definite location' there really are no United States alternate sections so set apart, as would be notice, or grounds of inquiry to purchasers. 2. Pre-emption will not attach under this law to the *United States reserved sections*, after the date of 'final allotment,' to the day of offering at public sale, for the reason that the interdicting clause in the Act of 1841, *again applies* to the United States alternate reserved sections aforesaid, the Act of 1853 only taking it off up to the period of final allotment."

It will be observed further, that the act of March 3rd, 1853, although partially removing the restric-

tions as to alternate sections of railroad grants contained in the pre-emption law, increased the price per acre at which these lands might be acquired during the period contemplated by the act of 1853, to $2.50 per acre. The right of settlers to acquire lands within the limits of railroad grants alternate to the lands granted for the benefit of railroad companies, was governed by these two acts at the time of the passage of the act of July 2, 1864. Prior to 1853, when the pre-emption law was extended, under the restriction noticed, to these alternate sections, all grants for the construction of railroads, canals and other public improvements, had been made, not to incorporated companies, but to states for the benefit of such companies as might thereafter be incorporated and should comply with the legislation of the respective states controlling the disposition of land granted to them.

Under the practice just indicated and in force in 1853, considerable time would necessarily elapse between the date of the grant to a particular state and the time when the company organized under the legislation of such state would earn the land and the state would become entitled to demand from the general land office that the land in question be certified to it. The grant of July 2, 1864, to the Northern Pacific Railroad Company, was one of the first instances of a departure from the former uniform practice of granting lands for railroads to states instead of directly to railroad companies. The grant to the Northern Pacific being in terms a present grant and its right to the lands

enuring upon the definite location of its line, the period contemplated by the act of 1853 during which the restriction contained in the pre-emption law was removed could not arise. The act of 1853 extended the operation of the pre-emption law over the alternate reserved sections up to the time when the granted lands should be finally allotted by the general land office. Under the provisions of the act of July 2, 1864, no period would arise during which the act of March 3rd, 1853, could operate. As indicated by the construction placed by the department on the act of 1853, the alternate reserved sections were open to pre-emption from the time of the definite location of a road to the time of final allotment, it being considered that no sections could be identified as "alternate reserved sections" until the definite location of the line. Under the act of 1864, the company took a present title without "final allotment" by the land office, to its granted sections immediately upon the filing of its map of definite location, and to continue and extend the spirit of the act of 1853, the particular language under consideration was inserted in the grant to the Northern Pacific Railroad Company. Without an extension in terms of the pre-emption and homestead laws to the reserved sections in the place limits of the company's grant, no rights to these lands could be acquired thereunder and, extending the policy which brought about the act of 1853 and which has been followed in every grant since the passage of the act of July 2, 1864, this language was inserted:

Grant to California and Oregon Railroad Company, act of July 25, 1866, section 2 (14 Stat. 239); grant to Atlantic and Pacific Railroad Company, act of July 27, 1866, section 6 (14 Stat. 292); grant to Stockton and Copperopolis Railroad Company, act of March 2, 1867, section 5 (14 Stat. 548); grant to Oregon Central Railroad Company, act of May 14, 1870, section 2 (16 Stat. 94); grant to Texas and Pacific Railroad Company, act of March 3, 1871, section 12 (16 Stat. 573). In all of these grants by various provisions the pre-emption law was extended to the reserved alternate sections. That the effect of these provisions and of the language in section 6 of the Northern Pacific act was to carry out the spirit of the act of March 3, 1853, and not to forbid a withdrawal of indemnity lands is demonstrated by an examination of the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company (14 Stat. 94). Section 5 of this act is almost word for word the same as section 6 of the Northern Pacific act. But the Placerville and Sacramento grant *contains no indemnity provision* and the only possible purpose for inserting such language was in pursuance of the settled policy to cover the exception in the pre-emption law relating to the reserved sections. And this was the construction placed upon section 6 of the Northern Pacific act before this exception of the pre-emption law was repealed in 1874 by the adoption of the Revised Statutes, and when the executive officers of the government were familiar with the history of legislation. The

first interpretation put upon this language is found in a letter of Secretary Usher to the commissioner of the general land office, dated March 9, 1865, transmitting the so-called "Perham Map." This letter is quoted in the opinion in *Oregon & C. R. Co. v. U. S.* 77 Fed. Rep. 79; 48 U. S. App. 6, and is as follows:

"Department of Interior.
Washington, D. C., March 9th, 1865.

"Sir:—

"Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from market. In view of the provisions of the 3rd and 6th sections of the act of congress, approved July 2, 1864, (Pamphlet Laws, pages 368-369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. *The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of congress.*

"Very respectfully, your ob't. servant,
"J. P. USHER, Secretary.

"The Commissioner of the General Land Office."

The concluding sentence of this letter shows that in 1865 the provisions of section 6 were understood to refer to the even numbered reserved sections. Moreover, the conclusion of the secretary

that section 6 in terms extends the homestead and pre-emption laws to lands in the indemnity limits and forbids their withdrawal is reached without a consideration of the acts of 1841 and 1853 here discussed, and furthermore without giving effect to the words "when surveyed," which occur near the close of the section.

By the terms of the act the pre-emption and homestead laws are only extended to "all other lands on the line of said road" *when surveyed,* and this language must be read in connection with the first provision of the section, to-wit:

"The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road."

This restriction that the pre-emption and homestead laws should not extend to the alternate reserved sections until surveyed is in full accord with the policy of the act of 1853, for in 1853 unsurveyed lands were not subject to pre-emption.

Furthermore, it is important to observe that, by the passage of the act of June 2, 1862 (12 Stat. 413), two years before the passage of the Northern Pacific granting act, the right of pre-emption was extended to all lands belonging to the United States to which the Indian title had been or should be extinguished "under the conditions, restrictions and stipulations" contained in the pre-emption law of 1841. By this it will be seen that under the construction of section 6, act of July 2, 1864, contended for by the secretary of the interior, congress must be held to have enacted that the pre-emption

and homestead laws should be extended to the unsurveyed lands situated in the indemnity belt of the grant to the company *when surveyed,* although two years earlier the same laws had been extended to these same lands.

THE DECISION OF THE SECRETARY IS CONTRARY TO THE SETTLED CONSTRUCTION OF THE ACT.

For nearly twenty years, the construction placed by the Interior Department upon the Northern Pacific grant was uniform and sustained the power of withdrawal of indemnity lands. Between 1871 and 1887 more than forty withdrawals of indemnity lands were made and the authority to make such withdrawals remained unquestioned until the decision by the secretary in the Guilford Miller case in 1888. The reports of land decisions by the secretary previous to 1888 are filled with cases in which the validity of these withdrawals was sustained. In the case of Prest vs. Northern Pacific Railroad Company 2 Land Decisions, 506 and in the letter of instructions of Secretary Teller, dated May 17, 1883, 2 Land Decisions 511, the question is considered at length and the power of withdrawal sustained. This construction prevailed during the terms of Secretaries Usher, Browne, Cox, Delano, Kirkwood and Teller.

In *United States vs. Pugh* 99 U. S. 269, this court said: "It is a familiar principle of interpretation that in a case of doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it with effect is entitled to great respect."

In *United States vs. Moore*, 95 U. S. 763, this court gave one of the reasons for this rule: "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

The construction of the executive officers, to which the courts give weight, is the *contemporaneous* and continued construction. Every intendment is in favor of the correctness of the practical construction with which Secretary Vilas was confronted when he announced the doctrine of the Guilford Miller case, but his own decision in that case over-ruling the long settled construction must rest solely upon his argument which we have undertaken to show ignores important and indeed controlling considerations and leads to a conclusion which is incorrect.

The conclusion that the contemporaneous construction of the interior department is correct and that the power of withdrawal existed, is sustained by the supreme court of North Dakota in *Hewitt v. Schultz*, (No. 241 on the present calendar), heard in argument with the case at bar, and by *Thompson v. St. P. M. & M. Ry. Co.*, 83 Fed. Rep.

546; *Southern Pacific R. R. Co. v. Wiggs*, 43 Fed. Rep. 333, and *Southern Pacific R. R. Co. v. Groeck*, 87 Fed. Rep. 970.

In the last case above cited, decided by the circuit court of appeals for the ninth circuit, the court construed section 6 of the grant by act of congress of July 27, 1866, (14 Stat. 292). Section 6 of this act is identical with section 6 of the Northern Pacific act. The court held, not only that section 6 did not forbid a withdrawal of indemnity lands, but constituted a statutory withdrawal after definite location.

THE SELECTION.

The complaint alleges that the railroad company selected the land in controversy, under the direction of the secretary of the interior by filing a selection list in the proper land office, on December 12, 1883, and that this list was accepted by the district land officers on January 5, 1884, who certified that the lands described were public lands, free from claims and rights. It is alleged further that on October 26, 1887, complying with certain instructions of the secretary of the interior issued subsequent to the selection, the railroad company specified as a basis for the land in controversy a tract of equal area excepted from the primary limits of the grant. The allegation of the complaint is categorical that the selection was made under the directions of the secretary of the interior. No

tract of lost land was specified as a basis for the selection until 1887, for by the express instructions of Secretary Teller issued May 28, 1883, the duty of specifying the basis of selections was properly committed to the commissioner of the general land office. (12 Land Decisions, 196.)

It was urged by the defendant in the court below that, conceding the land department to have rendered an erroneous decision upon the questions already discussed, yet the plaintiff is remediless for the reason that the land department has never approved the railroad company's selection. This argument is based upon the ground that it is committed to the secretary of the interior exclusively to determine whether a given tract of land in the indemnity limits of the grant is subject to selection and whether an equal quantity of land has been lost from the primary limits for which indemnity may be taken.

It is undoubtedly true that in the first instance these questions are committed to the secretary of the interior, and in so far as their determination depends upon matters of fact, his conclusions are final. But it does not follow when that officer cancels a selection under an erroneous view of the law and fails to pass upon the question of the status of the land selected or upon the question of lands being lost from the primary limits for which indemnity may be taken, that this failure will defeat the grant.

In *St. Paul & Sioux City Ry. Co. v. Winona & St. Peter Rd. Co.*, 112 U. S. 720, it appeared that

certain lands were situated within the indemnity limits of two grants, one made to the state of Minnesota for the benefit of the St. Paul & Sioux City Company, and one for the benefit of the Winona & St. Peter Company.

The grants were made by acts of congress of the same date, and it appeared that the St. Paul & Sioux City Company had made the earlier location of its line. Upon these grounds the interior department held that the right of that company to lands within its indemnity limits was superior, and although the Winona Company selected the lands first, the lands were certified to the state of Minnesota for the benefit of the St. Paul Company.

This court, speaking of the right of selection, said:

"Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land.

"In this case, and for these reasons, priority of selection secures priority of right. * * *

"It is no answer to this to say that the secretary of the interior certified these lands to the state for the use of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for *lieu* lands or for the extended grant of 1864, out of any odd sections within twenty miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the

Winona Company of rights which became vested by its selection of those lands. *Johnson v. Towsley*, 13 Wall. 72, 80; *Gibson v. Chouteau*, 13 Wall. 92, 102; *Shepley v. Cowen*, 91 U. S. 330, 340; *Moore v. Robbins*, 96 U. S. 530, 536."

It is apparent in this case that there was no finding by the secretary of the interior that at the date of selection of the lands in question by the Winona Company, they were of the class of lands subject to selection, or that an equal quantity of lands had been excepted from the place limits of the grant for which indemnity might be taken, for the selection of the Winona Company was canceled upon the ground of the earlier location of the St. Paul Company.

That the courts will not permit a grant to be defeated by the failure of the secretary of the interior to pass upon questions of fact necessary to the approval of an indemnity selection, is further illustrated by the case of *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1. In that case the Northern Pacific Company filed a bill to hold the St. Paul & Pacific Company trustee of the legal title of certain lands situated within the indemnity limits of its grant which had been certified to the state of Minnesota, and deeded by the state of Minnesota to the St. Paul & Pacific Company, upon the ground that the certification to the state was made under an erroneous construction of the two grants under which the secretary of the interior held that the grant to the state of Minnesota for the benefit of the St. Paul & Pacific Company was prior to the grant to

the Northern Pacific Company. This court held that the grant to the Northern Pacific Company was prior in time and that the lands in question were withdrawn for the benefit of the Northern Pacific Company and that the secretary of the interior committed an error of law in certifying the lands to the state of Minnesota. It was objected, however, by the St. Paul & Pacific Company that the Northern Pacific Company was not in privity with the United States and could not complain of the certification to the state, for the reason that the lands in question had never been selected by the Northern Pacific Company. In this connection the court said:

"As to the objection that no evidence was produced of any selection by the secretary of the interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the secretary in selecting from them, for they were all appropriated."

The selections never having been made, it is apparent that the court assumed the duty of passing upon the character of the lands, and the question of the deficiency in the indemnity limits, and an examination of the record in that case will show that the fact of the deficiency was not established by a finding of the interior department, but by evidence based upon an examination of the public records.

And the reason for the rule that where the secretary of the interior fails to find the facts necessary

to the approval of an indemnity selection, and patents are issued to other parties without a finding of such facts, the courts will perform the duty originally committed to the secretary, is found in the decisions of this court in cases involving lands claimed under the swamp land grants to the various states.

By these grants the states took all those legal subdivisions of lands, the major portion of which was so wet and swampy as to be unfit for cultivation. By the terms of the grants it was made the duty of the secretary of the interior to ascertain the character of the land, and upon identification in this manner, to furnish lists of the lands so determined to be swamp, to the states. And this court has uniformly held that where the secretary neglects or refuses to pass upon the question of the character of the lands the matter may be examined by the courts.

In *Hannibal & St. Joe. R. R. Co. v. Smith*, 9 Wall. 95, the question was presented. In this case the railroad company claimed under a grant from which lands theretofore granted were, of course, excepted, and brought an action to recover a tract of land from one Smith, who claimed the land as swamp land granted by the United States to the state of Missouri, and conveyed by the state to him. It was admitted that if the land did not pass to the state by the swamp land grant, it passed to the railroad company. The secretary of the interior had failed to pass upon the question of the character

of the land and the court below allowed the grantee of the state to show by parol evidence that the land was swamp in fact. This court said:

"By the second section of the act of 1850 it was made the duty of the secretary of the interior to ascertain this fact and furnish the state with evidence of it. Must the state lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the state did not depend on his action, but on the act of congress, and though the state might be embarrassed in the assertion of this right by the delay or failure of the secretary of the interior to ascertain and make out lists of these lands, the right of the state to them could not be defeated by that delay. * * *

"The matter to be shown is one of observation and examination, and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.

"Any other rule results in this, that because the secretary of the interior has failed to discharge his duty in certifying these lands to the state, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they are of the class excluded from the plaintiff's grant."

In *French v. Fyan*, 93 U. S. 169, commenting on *Hannibal & St. Joe Railroad Company v. Smith, supra*, and the admission of parol testimony in that case for the purpose of identifying the land as falling within the grant, the court said:

"The admission was placed expressly on the ground that the secretary of the interior had neglected or refused to do his duty; that he had made no selections or lists whatsoever, and would issue

no patents, although many years had elapsed since the passage of the act. * * *

"There was no means, as this court has decided, to compel him to act; and if the party claiming under the statute in that case could not be permitted to prove that the land which the state had conveyed to him as swamp land, was in fact such, a total failure of justice would occur, and the entire grant of the state might be defeated by this neglect or refusal to do his duty."

See also *Wright v. Roseberry*, 121 U. S. 488, where the cases on this subject are reviewed and the foregoing propositions are affirmed.

As said by the court in the case of *St. Paul & Sioux City R. R. Co. v. Winona & St. Peter R. R. Co., supra*, the arbitrary refusal of the secretary cannot defeat the right which the court declared to be a vested right acquired by a selection of land properly subject to selection, when made in accordance with the statute.

THE DEFICIENCY.

The complaint alleges that the whole of the line of the Northern Pacific Railroad was definitely located prior to the year 1885, by the filing of maps in the office of the commissioner of the general land office.

The complaint further alleges that at the respective dates of the definite location of the various portions of the line, there were within the primary limits of the grant, 10,624,746.27 acres of land lost from the grant by previous disposition; that at the respective dates of definite location, there were within the indemnity limits prescribed by the act

of July 2, 1864, not more than 7,177,769.71 acres of land subject to selection as indemnity.

By the joint resolution of May 31, 1870, (16 Stat. 378) a further indemnity belt ten miles in width on each side of the line was created, from which the company was entitled to satisfy losses occurring after the date of the grant, which could not be satisfied within the first indemnity limits of the state or territory wherein they occurred.

The complaint alleges that of all the lands lost from the primary limits not more than 2,887,076.57 acres were lost after the date of the grant, and that this was the measure of the quantity which could be satisfied from the second indemnity limits, and that the total area of lands in the first indemnity limits, created by act of July 2, 1864, lacked more than 550,000 acres of being sufficient to satisfy the losses required to be made up from those limits.

The proposition is conceded that where no such deficiency exists, the title to indemnity lands under a railroad grant does not vest until selection, and probably not until the approval of such selection by the secretary of the interior. It is insisted, however, that where there are not sufficient indemnity lands within the limits from which indemnity may be taken, the rule is otherwise; that where the reason for the rule is absent, the rule must fail.

The decisions of this court distinguish between the vesting of the title to place lands and indemnity lands merely by reason of the means of identification of the two classes of lands. Lands in place

are *identified* by the definite location of the line of road, while indemnity lands are *identified* by selection. In both cases the grant is a "float" and is brought to anchor by different means. *St. Paul & Sioux City Ry. Co. v. Winona & St. Peter Rail-Road Company,* 112 U. S. 720.

It is submitted that the decision of this court in *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company,* 139 U. S. 1, above referred to, is conclusive on the proposition that where a deficiency exists in indemnity lands, no selection is necessary. In this case the following facts appeared:

By act of congress of March 3, 1871, lands were granted to the State of Minnesota to aid in the construction of the St. Vincent extension of the St. Paul & Pacific Railroad. This grant, however, by its terms, did not become effective until the execution of a release of certain lands before granted. The release was executed December 13, 1871, and the Court held the grant operative from that date. The line of the St. Vincent extension crossed the line of the Northern Pacific Railroad near Glyndon, Minnesota, and there was consequently an overlapping of the two grants, and certain lands fell within both the place limits of the St. Paul & Pacific grant and the indemnity limits of the Northern Pacific grant. The Northern Pacific line was definitely located November 21, 1871, before the grant to the St. Paul & Pacific Company took effect.

Certain of the lands mentioned as falling within the indemnity limits of the Northern Pacific grant were certified to the State of Minnesota, and by it deeded to the St. Paul & Pacific Company. The Northern Pacific Company filed its bill in equity alleging that it was the equitable owner of these lands, and that the St. Paul & Pacific Company was the holder of the naked legal title, and prayed a decree that the legal title was held in trust.

The point was made by the defendant company that the bill could not be maintained for the reason that no selection was shown by the Northern Pacific Railroad Company or approval thereof by the secretary of the interior. This court said, as above quoted:

"As to the objection that no evidence was produced of any selection by the secretary of the interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was therefore no occasion for the exercise of the judgment of the secretary in selecting them for they were all appropriated."

The court sustained the bill and held the St. Paul & Pacific Company trustee of the legal title of the lands in question for the benefit of the Northern Pacific Railroad Company.

The further proposition is well settled, that no one can maintain a bill to hold another trustee of the legal title unless he can show himself in privity with the grantor and possessed of an equity supe-

rior to that of him who holds the legal title. *Hartman v. Warren,* 76 Fed. Rep. 157; *Smelting Co. v. Kemp,* 104 U. S. 636, 647.

It follows, therefore, in the case above referred to, that unless the Northern Pacific Railroad Company had shown itself to be in privity with the United States, and possessed of a superior equity, it must have failed in its suit to hold the St. Paul & Pacific Company trustee of the legal title to the lands in question; and it could not have shown itself in privity with the United States as to these lands, or possessed of any equity in them unless the lands were identified as lands falling within its grant.

The rule is unquestioned that where a party has done all things which the law requires to entitle him to acquire public lands, that he will be considered the equitable owner. *Wirth v. Branson,* 98 U. S. 118; *Hedrick v. A. T. & S. F. Ry. Co.,* 167 U. S. 673.

If, therefore, under the rule declared by this court in the St. Paul & Pacific case, a selection was unnecessary to identify the lands and place the company in privity with the United States, what further was required by the law to be done to earn the lands than was in fact done? A railroad company does not take title to indemnity lands by virtue of a *selection,* the function of a selection is merely to identify the lands as falling within the grant, and thereupon the title passes.

It is submitted that the judgment of the Supreme Court of Washington should be reversed.

C. W. BUNN and
JAMES B. KERR,
Counsel for Plaintiff in Error.

Office Supreme Court
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JAMES H. McKENNEY,
Cl

No. 49.

Brf. of Turner for D. E.

Filed Oct. 8, 1900

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 169.

J. M. MOORE, PLAINTIFF IN ERROR,

vs.

JOHN CARMODE, DEFENDANT IN ERROR.

ARGUMENT FOR DEFENDANT IN ERROR.

GEO. TURNER,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-27-1900

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1880

No. 449

J. M. MOORE, PLAINTIFF IN ERROR,

vs.

JOHN CARMODE, DEFENDANT IN ERROR.

Argument for Defendant in Error.

The complaint, printed in transcript (pp. 1 to 13, inclusive), sets out the several sections of the act of Congress of July 2, 1864, which are proper to be considered in determining the sufficiency of the complaint, and also the supplementary joint resolution of Congress of May 31, 1870, and it is not considered necessary to reproduce them here. The complaint also sets out decisions by the Commissioner of the General Land Office and by the Secretary of the Interior, in which it would appear that some of the questions of law urged by plaintiff in error were considered and adjudicated against him in the Interior Department; but it does not appear from these decisions, nor from any averment in the complaint, that other questions of fact were not

considered and decided in the Interior Department, either before or after the decisions set out in the complaint, which would make the error of those decisions, if erroneous in any respect, innocuous and void of harm. It was essential for the Land Office to find two facts in order to give the railroad company any standing whatever to dispute the preemption claim of defendant Carmode:

First. That there was a deficiency in the place lands granted to it, which would entitle it to resort to the lieu or indemnity lands.

Second. That the indemnity lands selected by it, although within the indemnity limits, were not reserved, sold, granted, or otherwise appropriated prior to the attaching of its rights, and that the same were then free from pre-emption or other claims or rights. The complaint undertakes to conclude these matters by averring the facts as it was claimed they existed, but nowhere does it aver that such facts were found in favor of the railroad company by the department officers, nor does it negative anywhere that such facts may have been found against the railroad company by those officers.

From the facts found by the Commissioner and by the Secretary of the Interior, as disclosed in the complaint, it is seen that Mrs. Ora Standiford settled on the land in question in March or April, 1882, and that she was qualified to enter the land under the homestead law; that her settlement consisted of the erection of a frame house 16 x 18 feet, one story and a half high, on the land, the ploughing of three or four acres, and the digging of a well. She established her residence on the land in March or April, 1882, and remained there continuously with her family until the fall of 1885, when she sold her improvement and relinquished her rights to John A. Long, who occupied the land for a short time and was succeeded by his brother, Henry W. Long, in 1888, who remained in possession until the fall of

1889, when the defendant in error Carmode purchased the improvements and moved on the land. Since then Carmode has remained continuously on the land. The Commissioner expressly finds that when the company made its selection the land was embraced in the *bona fide* settlement of Mrs. Standiford, who was qualified to enter the same under the settlement laws. The foregoing are the only facts deemed necessary to be stated in addition to those set out in the brief of plaintiff in error.

ARGUMENT.

First. Nearly every question urged by plaintiff in error is settled against him by the late case of Northern Pacific Railroad Company *vs.* Sanders, 166 U. S., 620. It was there decided that it was the purpose of the act of Congress granting lands to the Northern Pacific Railroad Company to leave the same open to entry, settlement, and the initiation of claims by the general public up to the time that the grant of the company attached to the lands. As is now well established, the grant attached to place lands on the filing of the map of definite location, and to indemnity lands at the time of their selection with the approval of the Secretary of the Interior.

"The only ground on which a contrary view can be rested is the provision in the sixth section of the act of 1864 that 'the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company as provided by this act.' But this section is not to be construed without reference to other sections of the act. It must be taken in connection with section three, which manifestly contemplates that rights of pre-emption or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established. Literally interpreted, the words above quoted from section six would tie the hands of the

Government so that even it could not sell any of the odd-numbered sections of the land after the general route was fixed—an interpretation wholly inadmissible in view of the provisions in the third section. The third and sixth sections must be taken together, and so taken it must be adjudged that nothing in the sixth section prevented the Government from disposing of any of the lands prior to the fixing of the line of definite location, or for the reasons stated, from receiving, under the existing statutes applications to purchase such lands as mineral lands."

Northern Pacific Railroad Company *vs.* Sanders, *supra.*

If any re-enforcement of the above reasoning were necessary, it is found in the fact that the joint resolution of Congress approved May 31, 1870—a resolution passed at the instance of the railroad company and for its benefit, and upon which it acted,—gave legislative construction to the granting act of 1864 in exact accordance with the judicial construction reached by the court from a consideration of the act of 1864 alone. (See 16th United States Statutes at Large, p. 378.)

Under this holding we are relieved from a consideration of the questions treated of at great length in the brief of plaintiff in error concerning the validity of the several withdrawals of the granted lands by the Secretary of the Interior and the effect of such withdrawals upon the right of settlers to initiate homestead and pre-emption entries.

Second. The only question left to be considered is, Was the settlement of Mrs. Standiford on the land in question, prior to the selection of the land by the railroad company, such a settlement as excepted the land from the grant to the railroad company? She settled in 1882. The company undertook to select the land in 1883. The department found Mrs. Standiford to be a "qualified settler" on the land, and that her settlement was *bona fide.* What steps, if any, she had taken to make record of her settlement

prior to her relinquishment in 1885 the complaint does not state, nor do the proceedings before the Land Department, so far as the complaint sets them out, disclose. So far as anything appears to the contrary, she was on the land regularly as a pre-emption settler, having taken all the steps permitted to her to protect herself against adverse rights. She was so treated in the hearing before the department, and without suggestion from the railroad company to the contrary. It does appear from the complaint that during all this time there was an order from the Commissioner of the General Land Office on file at the local land office withdrawing the land in controversy from homestead or pre-emption.

Under these facts we claim:

a. That the land was not free from pre-emption at the time the company undertook to select it. Mrs. Standiford, a qualified settler, had settled thereon, made valuable improvements thereon, and lived thereon continuously with the intention of acquiring title under the pre-emption laws. She was in default, if at all, only in respect to the filing of her declaratory statement. The only penalty fixed by the statute for the failure of such a settler to file his declaratory statement is declared as follows:

"Otherwise his claim shall be forfeited and the tract awarded to the next settler in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law" (Revised Statutes, section 2265).

That this forfeiture inures only for the benefit of another settler, and that if the right of such a settler has not intervened the original settler may file his declaration at any time, has been the settled law ever since the case of Johnson *vs.* Towsley, 13 Wallace, p. 72. The court in that case say:

"If no other party has made a settlement or has given notice of such intention, then no one has been injured by

the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one has initiated a right of pre emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration, or in making it void when made, and we think that Congress intended to provide for the protection of the first settler by giving him three months to make his first declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right. As Towsley's settlement and possession were continuous, and as his declaration was made before Johnson or any one else asserted claim to the land or made a settlement, we think his right was not barred by that section under a sound construction of its meaning" (Johnson *vs.* Towsley, *supra*. See also, to same effect, Lansdale *vs.* Daniels, 100 U. S., 113; Whitney *vs.* Taylor, 158 U. S., 85).

b. The order of the Commissioner of the General Land Office withdrawing the land from entry excused Mrs. Standiford from filing her declaratory statement. While the order had no validity in law, it was binding as a rule of action on the subordinate officers, and it was undoubtedly their duty to obey it. Undoubtedly they would have obeyed it. An attempt, then, on the part of Mrs. Standiford to make her filing would have been vain and useless, and the law does not exact a vain and useless thing from any person (Tracey *vs.* Irwin, 18 Wallace, 549; United States *vs.* Lee, 106 U. S., 196).

c. The complaint is silent as to what steps, if any, Mrs. Standiford may have taken between the date of her settlement on the land and the time the railroad company made its selection to attempt to comply with the requirement of the law concerning the filing of her declaratory statement within three months. For aught that appears she may have offered her declaration within the time provided and had the same refused. She was treated by the Land Department as a

qualified settler on the land, and her position in that respect does not appear to have been questioned by the railroad company. The only question raised by the company and litigated by it in that hearing was whether such a settler as Mrs. Standiford was, having qualified herself in every way, could take in opposition to its grant. Indeed, it is questionable if that is not the only contention intended to be raised by the complaint here.

We respectfully submit that the complaint is insufficient to negative either the *bona fides* of Mrs. Standiford's settlement or the doing by her of every act necessary to keep her rights alive against any and every person in the world, or to show that on the facts before the Land Department that department had committed an error in law in deciding such to be her status (Durango, etc., Co. *vs.* Thayer, 80 Federal Reporter, 427).

Third. But if we are in error in insisting that Mrs. Standiford was a qualified pre-emptor, with all the standing and rights of such, at the time of the selection of the land by the company, notwithstanding her failure to file declaratory statement, we insist that her settlement, residence, and cultivation with the intention of availing herself of the pre-emption law constituted a "claim" within the meaning of the excepting clause of the granting act.

The place lands to which the grant of the railroad company attached were lands not "reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights."

The indemnity lands, to which the railroad company was entitled to resort in case of deficiency in the place lands, are described in the statute simply as "other lands." What "other lands" did the statute intend to give the company a right to resort to? Manifestly, other lands of the class directly granted, other lands "not reserved, sold, granted, or

otherwise appropriated and free from pre-emption or other claims or rights." It is impossible to suppose that, as to indemnity lands which the company might never be compelled to resort to, and which it was never contemplated it would be required to exhaust, Congress intended to deal more illiberally with the general public than when dealing with place lands. If, then, a settlement of the character of Mrs. Standiford on place lands would defeat the attaching of the grant of the company to such lands, such settlement on indemnity lands would *a fortiori* defeat their selection by the company.

Such a settlement as that of Mrs. Standiford, according to the settled mode of construing these land grants, excepts the land from the operation of the grant. Such grants are construed strictly against the grantees and liberally in favor of the public whose rights may conflict with those of the grantees. If the settlement can be said to have been not a pre-emption because there had been no filing, it certainly constituted a "claim or right" within the meaning of the excepting clause (Broder *vs.* Water Co., 101 U. S., 274; R. R. Co. *vs.* U. S., 92 U. S., 733; Shipley *et al. vs.* Cowan, 91 U. S., 330; Kansas Pacific R'y Co. *vs.* Dunmeyer, 113 U. S., 629; Northern Pacific R. R. Co. *vs.* Musser Santry Co., 168 U. S., 164).

"We have had occasion to construe a very common clause of reservation in grants to other railroad companies and in aid of other works of internal improvement, and in all of them we have done so in the light of the general principle that Congress, in the act of making these donations, could not be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect, were still meritorious and had just claims to legislative protection" (Broder *vs.* Water Co., *supra*).

"The company had no absolute right until the road was built or that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his rights became absolute. The pre-emptor had similar duties to perform in re-

gard to cultivation, residence, &c., for a shorter period, and then payment of the price of the land. It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligations. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the Government as to the performance of their obligations" (Kansas Pacific R'y Co. *vs.* Dunmeyer, *supra*).

"In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. If on examination there are doubts about that intention or the extent of the grant, the Government is to receive the benefit of them. * * * Such grants could not otherwise be construed; for Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow without disturbing existing relations and producing vexatious conflicts" (R. R. Co. *vs.* U. S., *supra*).

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States shall have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of title, when the same are regularly followed up, is deemed to be first in right" (Shipley *vs.* Cowan, *supra*).

"Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply 'free from rights,' but 'free from claims,' and surely the defendant railway company had an existing claim. No one can read this entire descrip-

tion without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road" (Northern Pacific Railroad Co. *vs.* Musser Santry Co., *supra*).

Fourth. We do not read the case of The N. P. R. R Co. *vs.* Colburn, 164 U. S., 383, as conflicting with any of the foregoing views. In that case there was nothing to show that Kelly, the occupant of the land, was a qualified, *bona fide* settler under the homestead or pre-emption laws. He had never made any filing on the land, and his occupancy had long been abandoned. The decision of the Secretary of the Interior, as noticed by the court, was based simply on the fact of occupation and cultivation. He was a mere squatter, a trespasser, without rights against the Government or against any person or corporation.

It would be impossible for any court to hold that occupancy of such a trespasser constituted either a pre-emption or a "claim or right" within the meaning of the excepting clause of the railroad land grant; but that the court did not mean to hold that as against this railroad grant an actual filing was necessary to constitute a *bona fide* settlement by a pre-emptor or homesteader which would defeat the grant is evident from the concluding paragraph of the opinion. The court there notices the omission of the word "attached" from the Northern Pacific grant, which word had been deemed significant in the construction of other grants, and expressly reserves the effect of that and also of other peculiarities of the case for further consideration.

The supreme court of Minnesota, in the case of McHenry *vs.* Nygard, 72 Minn., 2, have fallen into the error of counsel for plaintiff in error in construing the Colburn case; but that court offers nothing by way of reasoning to sustain the position for which it cites the Colburn case as authority,

and of course if it has erred in construing that case, then its force as an authority or precedent falls to the ground.

In the department cases cited by plaintiff in error on page 11 of his brief, following the Colburn case, the grants under construction all used the word "attached," and the decisions all proceed on the peculiar significance attached to that word by the decisions of this court. Moreover, each of the cases will be found on examination to have had special features negativing the *bona fides* of the settlement.

Fifth. On the question of the Executive withdrawal or reservation, which the plaintiff in error insists operated as a bar to the initiation of a pre-emption right by Mrs. Standiford, we submit, in addition to the case of Northern Pacific Railroad Company *vs.* Sanders, *supra*, the following departmental decisions:

N. P. R. R. Co. *vs.* Miller, 7 Land Dec., 100; N. P. R. R. Co. *vs.* Davis, 19 Land Dec., 87; Cole *vs.* N. P. R. R. Co., 17 Land Dec., 8; N. P. R. R. Co. *vs.* Fugeli, 10 Land Dec., 288; Spencer *vs.* N. P. R. R. Co., 10 Land Dec., 440; S. P. R. Co. *vs.* Kanawyer, 23 Land Dec., 500; M., K. & T. R. Co. *vs.* Troxel, 17 Land Decisions, 122; N. P. R. Co., *vs.* Lilothun, 21 Land Dec., 487; Grunewald *vs.* N. P. R. Co., 24 Land Dec., 195; N. P. R. Co. *vs.* Willis, 21 Land Dec., 395; S. P. R. Co. *vs.* McKinley, 22 Land Dec., 493; N. P. R. Co. *vs.* Flannery, 20 Land Dec., 127; Stuart *vs.* S. P. R. Co., 22 Land Dec., 61; Hastings *vs.* Christensen, 22 Land Dec., 257.

The foregoing cases amply sustain the position that all these withdrawals were nullities because in conflict with the true intent and purpose of the granting act.

The plaintiff in error takes issue in his brief with the decisions of the Land Office, but he does not notice the Sanders case, decided by this court, and which is infinitely more sweeping in its effect than any of the departmental decisions.

His idea that the positive direction of section 6 of the

granting act, to the effect that all lands on the line of the road not granted should be open to homestead and pre-emption settlement, was for the purpose of abrogating the provision of the pre-emption act of 1841, reserving from the operation of that act the sections of land alternate to other sections granted to the States in aid of canal, railroad, or other public improvement, falls to the ground when we examine the act of Congress approved June 2, 1862 (12 Statutes at Large, p. 413). That act was intended to remove all restrictions on the right to pre-empt lands fitted for pre-emption settlement and not otherwise appropriated. It removed the restriction against settlement on unsurveyed lands and on alternate reserved sections on lands within railroad land grants. It was so construed by the compilers of the Revised Statutes and has ever since received such construction by the Land Department. (See Revised Statutes, sec. 2257.)

The words "all the lands" in the act of 1862 have been properly construed to mean all lands fitted for agriculture, not valuable for minerals or salines, and not reserved or occupied for some one of the manifestly overruling purposes mentioned in the pre-emption act of 1841. The right was extended to all such lands, subject to the other conditions, restrictions, and stipulations of the act of 1841. The act of 1862 must have been so construed to have had any sensible effect at all, because all the limitations on the character of the lands which might be pre-empted were in the same section of the act of 1841 and stated in the same way, and it is manifest that it was not intended to leave them all in force.

The language of the act of 1862 is as follows:

"That all the lands belonging to the United States to which the Indian title has been or shall be extinguished, shall be subject to the operations of the pre-emption act of the fourth of September, eighteen hundred and forty-one, and under the conditions, restrictions and stipulations therein mentioned."

It will be seen, then, that the act of 1862, two years before the granting act here under consideration, had accomplished the purpose which plaintiff in error insists the provisions of section 6 of the granting act were intended to accomplish.

But, in view of the decision of this court in the Sanders case, there is but little utility in considering what object Congress had in mind by the use of the language employed in section 6 of the granting act. That case holds that section 6 must be construed in connection with section 3, and that, construing both together, it is shown to have been the intention of Congress to leave both the lands granted and those not granted, the place lands as well as the indemnity lands, open to settlement, purchase, and the initiation of claims at all times prior to the attaching of the title of the railroad company, and the consequence necessarily follows that prior to the attaching of the railroad title there could be no withdrawal, and after the attaching of the railroad title withdrawal would be a vain and futile act.

Seventh. It is the doctrine of this court in this class of cases, too well settled to need the citation of authorities, that a party seeking the aid of the court must prevail, if at all, on the strength of his own right and not on the weakness of the title of his adversary. The lands sought to be subjected to plaintiff's right are indemnity lands, never granted to the company, but the latter was given the right to resort to them in the event of the United States not having "full title" to all the granted lands, or some of them having been "reserved, sold, granted, or otherwise appropriated," or their not being "free from pre-emption or other claims or rights" at the time of the definite location of the road. The company had no right or title in them prior to their selection, with the approval of the Secretary of the Interior, in lieu of lands in place which had been lost to the company

by reason of the excepted cases referred to (Kansas & Pacific R. Co. *vs.* Atchison R. Co., 112 U. S., 414; St. Paul, etc., R. Co. *vs.* Winona R. Co., 112 U. S., 720; Ryan *vs.* C. P. R. Co., 99 U. S., 382; Cedar Rapids, etc., R. Co. *vs.* Herring, 110 U. S., 27; Wisconsin R. Co. *vs.* Price Co., 133 U. S., 496; Wisconsin R. Co. *vs.* Forsythe, 159 U. S., 46).

This court, in Wisconsin R. Co. *vs.* Price Co., *supra*, laid down the rule which should govern in the allowance of these indemnity selections as follows:

"The approval of the Secretary was essential to the efficacy of the selections and to give the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the lands granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected, could be properly taken for those deficiencies."

Where is the allegation in the complaint that the Secretary found any deficiency in the place lands, or that the particular indemnity land selected could be properly taken for those deficiencies? There is none. That this omission is fatal to the sufficiency of the complaint we cite Durango, etc., Co. *vs.* Evans, 80 Federal Reporter, 427; Stewart *vs.* McHarry, 159 U. S., 643; Bishop of Nesqually *vs.* Gibbon, 158 U. S., 155; Steel *vs.* S. M. R. Co., 106 U. S., 447; Gale *vs.* Best, 78 Cal., 235; New Dunderberg Min. Co. *vs.* Old *et al.*, 79 Fed. Rep., 598.

The case of St. Paul and Pacific R. Co. *vs.* N. P. R. Co., 139 U. S., 1, properly considered, does not militate against this position. The question in that case was between two land-grant roads. The St. Paul and Pacific, taking under a later grant than the Northern Pacific, undertook to extend its place grant over the indemnity limits of the North-

ern Pacific. The court held that this could not be done. Said the court:

"We are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself."

This was stated by Mr. Justice Brewer in another form when deciding the same case in the lower court:

"The decision in 97 U. S., *supra*, places all land-grant roads on the same plane, and that a different one from that occupied by settlers and private purchasers, and settles all conflicts of title by a rule clear, simple, and just, viz: priority of grant. Congress may fairly be regarded as standing indifferent between all roads and intending to apply this just and simple rule of priority as between successive beneficiaries" (Northern Pac. R. Co. *vs.* St. Paul, etc., Co., 26 Federal Rep., 551).

The concluding language from the principal opinion quoted in the brief of plaintiff in error must be considered in the light of the parties before the court and the nature of the right urged by each. The allowance of the right of either would absorb everything and leave nothing for the other. Moreover, if the right of the Northern Pacific attached, it was prior in point of time and left nothing whatever for the grant of the St. Paul and Pacific to operate on. As between two such litigants urging such rights, the court might well say, "there was therefore no occasion for the exercise of the judgment of the Secretary in selecting them (the lands), for they were all appropriated."

Upon all the foregoing questions except those relating to the qualification of Mrs. Standiford, as a pre-emption

settler, we cite, as determining those questions in our favor, the late case of Southern Pacific Railroad Company *vs.* Wood, 124 California, 475.

We respectfully submit that the complaint is insufficient, and that the demurrer to the complaint was properly sustained.

GEO. TURNER,

Counsel for Defendants in Error.

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OCTOBER TERM, 1900.

Filed Oct. 23, 1900.

FRED. HEWITT, PLAINTIFF IN ERROR, v. EMIL SCHULTZ, ET AL. } No. 34.

J. M. MOORE, PLAINTIFF IN ERROR, v. D. B. STONE, ET AL. } No. 48.

J. M. MOORE, PLAINTIFF IN ERROR, v. JOHN CARMODE. } No. 49.

Additional Brief of Plaintiff in Error in No. 34, and of Defendant in Error in No. 48 and 49, in Answer to Supplemental and Reply Briefs Filed by Counsel Representing the Northern Pacific Railroad Company's Grantees Subsequent to the Call of these Cases for Argument.

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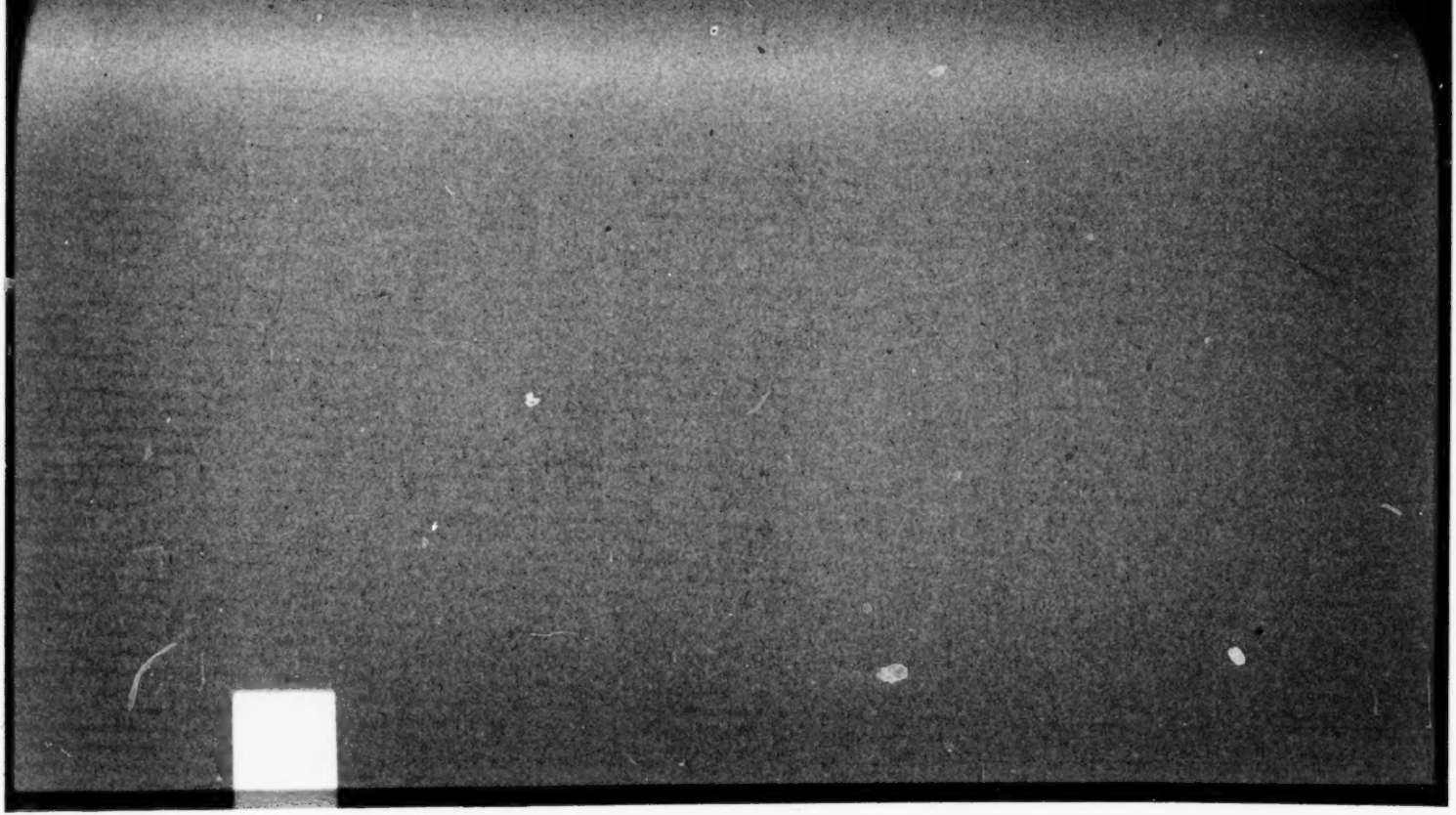

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 34. FRED. HEWITT, PLAINTIFF IN ERROR,

v.

EMIL SCHULTZ ET AL.

No. 48. J. M. MOORE, PLAINTIFF IN ERROR,

v.

D. B. STONE ET AL.

No. 49. J. M. MOORE, PLAINTIFF IN ERROR,

v.

JOHN CARMODE.

Additional Brief of Plaintiff in Error in No. 34, and of Defendant in Error in No. 48 and No. 49, in answer to supplemental and reply briefs filed by counsel representing the Northern Pacific Railroad Company's grantees subsequent to the call of these cases for argument.

BRIEFS IN ALL CASES.

We submit, and the Court is requested to consider, the briefs and arguments for the settlers, and the opinions

and special proofs appearing in the records in cases No. 34, No. 47, No. 48, and No. 49, which were argued together as one case, as applying to all the cases alike. Effort has been made to avoid duplicating the arguments of one case in the others.

The Court is further requested to read the decisions of the Department of the Interior in—

Aug. 13, 1887. Atlantic & Pacific R.R. Co., 6 L. D., 85–93;
Aug. 2, 1888. N. P. R.R. Co. *v.* Miller, 7 L. D., 100–126; (Covering 80 cases, none of which have been appealed or reviewed, while numberless cases have followed this decision in the 12 years past);
Sept. 3, 1891. N. P. R.R. Co. *v.* Walters, 13 L. D., 230–236;
June 2, 1892. N. P. R.R. Co. *v.* Pettit, 14 L. D., 591–592; (Showing that St. Paul and Pacific R.R. Co. *v.* N. P. R.R. Co.—139 U. S. 1—is not authority, upon state of facts found in records herein, that selections are not necessary in indemnity limits);
July 7, 1893. Cole *v.* N. P. R.R. Co. 17 L. D., 8–19;
Oct. 14, 1893. LaBar *v.* N. P. R.R. Co. 17 L. D., 406–410;
July 25, 1894. N. P. R.R. Co. *v.* Davis, 19 L. D., 87–91;
Oct. 4, 1894. N. P. R.R. Co. *v.* Benz, 19 L. D., 229–231;
Dec. 20, 1897. N. P. R.R. Co. 25 L. D., 511–514;
April 29, 1898. N. P. R.R. Co. *v.* Streib, 26 L. D., 589–591;
Digest of Land Decisions, Dept. Interior (1897);
"Withdrawal," pp. 477–489;
"Indemnity," pp. 489–492;
"Selection," pp. 492–504;

not as authorities, but as full and exhaustive arguments, which we make our own, of the questions involved in all these cases; the reasons for the Department's uniform

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rulings for the past 12 years, that, unless clearly wrong, should be decisive after thousands of vested rights have accrued to settlers thereunder.

THE BAR OF THE STATUTE OF LIMITATIONS.

Counsel have misapprehended our application of the statute of limitations of ten years. We were aware of the contention that the statute is suspended during contest in the Land Department, and this was particularly suggested in the oral argument, but it is without force. It is open for this Court to determine whether a contestant may hold up a pre-emption entry for 12 years by an ineffectual contest, and then, upon the facts appearing in these records, the same facts urged and *decided* in the contest, be aided by a court of equity to avoid the consequence of his own laches, the bar against a suit at law. The trouble is that the record, in the matter of title or right in the railroad company, blows hot and cold. Plaintiff wants to secure the benefits of the rights for which action is barred, so far as relates to relief, but for jurisdictional purpose, to avoid the bar by asserting these rights in an action also for entirely different relief that would be of little value unless it included that which he no longer has any legal right to demand. This can be done no more in equity than at law. In the complaint, at p. 8, Record No. 49, appears the following:

> "The plaintiff alleges that by virture of the premises and *upon the definite location* of the line of said railroad, the said Northern Pacific Railroad Company became *the owner in fee simple* of the northeast quarter of section three, in township thirteen, north of range forty-two east, Willamette meridian, in Garfield county, in the then Territory (now State) of Washington." (The land in controversy.)

The material dates in this connection are :

Feb. 7, 1898, complaint filed (p. 14, Record No. 49).

Oct. 4, 1880, first definite location of line of road (p. 8, Record No. 49).

Oct. 4, 1880, withdrawal of lands in place and indemnity limits.

"Prior to 1885," final definite location (p. 7, Record No. 49).

(If the Act of July 2, 1864, does not prohibit withdrawal of indemnity lands, as we contend—at least it does not direct it, and authority for the executive withdrawal must be found elsewhere.)

Aug. 15, 1887, the executive withdrawal as to indemnity land was revoked by the same authority. (6 L. D. 92–93.)

No other withdrawal of indemnity lands has been made therefor, and the revocation having been within the power of the executive, whether because the withdrawal had been invalid or improvident, in contemplation of law, no withdrawal ever has been made. The right of the executive to revoke the withdrawal is unquestioned by any court and has uniformly been recognized by the Department.

In 1883, in Dakota, and

Jan. 5, 1884, in Washington, was the first alleged selection (p. 8, Record No. 49), in bulk, which we style an office listing without actual selection, and which was abandoned by the later selection of October 26, 1887, therefore a fatal gap in the railroad company's chain of title; but this never was approved, therefore void. (P. 2, Bunn & Kerr, Reply Brief.)

Oct. 26. 1887, in 48 and 49.

In 1892, in No. 34, the company made an alleged tract for tract selection that, also, never was approved. (P. 9, Record, No. 49.)

Apr. 10, 1882, settlement in No. 34.

Nov. 2, 1882, pre-emption filing.

Apr. 4, 1883, final proof.
June 22, 1895, patent issued.
In March or April, 1882, settlement in No. 48.
July, 1890, pre-emption filing.
May 2, 1898, patent issued.
Apr. 25, 1882, settlement in No. 49.
Jan. 5, 1884, pre-emption filing.
In 1897, patent issued.

(No patent or other record title was ever issued by the Government to the R.R. Co. which claims that the Act of July 2, 1864, granted fee simple title thereto, dating from definite location of 1884 or 1887—which?)

We must take the record as we find it; so, the complaint in 48 and 49 averring fee simple title, counting from the latest and most advantageous date for the R.R. Co., the statute interposes to bar suit, unless saved by the pendency of the Land Office contest.

Suit for possession, ordinarily ejectment, is an ample remedy when one party has title warranting possession and the other only adverse possession under none or some inferior title. Practically, whatever the legal fiction, suit for possession settles the dispute over title. One having the complete fee simple and equitable title must necessarily have right of possession superior to any other claimant. One having an adequate remedy at law may not resort to equity. That is this case, so far as the controversy over the land and between the parties. Something more might be necessary to obtain a construction, especially an overturning of the Guilford Miller decision. The R.R. Co., which neglected to bring that case, or the 80 other cases settled by it, into the courts within ten years after its promulgation, August 2, 1888, could well afford to lose these four cases on the merits if thereby the Miller precedent could be modified; but these four

settlers care nothing about ancient history; they only desire to save their own homes under the facts in their respective cases and the law applicable thereto.

Further along in the complaint, following the averment of selection, although even the words "*duly* selected," or their equivalent are omitted (and the ascertainment of a deficiency, and the due selection and approval within indemnity limits are absolute prerequisites to either title or claim by virtue of selection in lieu of deficiency), appears

> "That by reason of the facts *hereinbefore* set forth, the said Northern Pacific Railroad Company became the owner in fee and entitled to the immediate and exclusive *possession* of said lands and the whole and every part thereof, and was the owner of the complete equitable title therein and thereto." (P. 9, Record, No. 49.)

And the date fixed for the inception of this last above title was October 26, 1887 (same paragraph of complaint), ten years *and three months* prior to filing of suit.

Therefore, if *fee simple title* passed by and with the definite location of October 2, 1880, or "prior to 1885," or by the selection of October 26, 1887 (even were the later selection not of itself an abandonment of the earlier selection which did not pretend compliance with departmental requirements), the above averments at page 9, Record No. 49, dating plaintiff's right or claim herein only from October 26, 1887, must be taken as a formal abandonment of all earlier claim. The settler's rights and title accrued before the last named date.

Plaintiff cannot take advantage of his own wrong, and by his own act in instituting and prolonging the contest of the entry for twelve years, suspend the running of the statute. Whoever resorts to equity must have clean

hands and do equity. Whoever asks equity to enforce a legal right must (ordinarily) have exhausted all remedies at law. A man may not let the statute bar an action at law, and then, because of some additional strengthening of the title of the party in possession, say by the acquiring of a new title, at a day within the statute, do indirectly what he could not do directly, and try the old title or oust possession under it. This suit is for *possession* of the land, without which recovery would be valueless. It is a combined action at law and in equity permitted by the Washington code practice, and will be treated here as an equitable proceeding. As the R.R. Co.'s grantee has to-day no right or title not existing to the fullest extent on October 26, 1887, at latest, he had the same right of action then that he had February 7, 1898, when barred by the ten year statute unless the running of the statute was suspended by something not yet suggested in record or argument, *for nothing occurred between those dates.* Suit to vacate a patent could not be filed until after the issue of the patent, of course, and that argument would apply to a considerable portion of this controversy, the relief prayed for herein ; but this suit, stripped of all legal disguise is for *possession ;* and if plaintiff is entitled to possession now so he was entitled October 26, 1887, more than ten years before suit. Because this suit could affect rights within ten years, is no reason why it may go behind the statute and decide issues barred from consideration by any court, the vital issues, too, so far as the settler and his adversary claimant are concerned.

It is well settled that a homestead entry will support ejectment. This being so, necessarily a better title or right so superior that it would oust an entryman's possession would support some form of action for possession, as the form of action herein, which has been brought

upon the state of facts that existed prior to October 26, 1887. In these cases, the plaintiff asserts such superior right or title.

True, it is a little difficult to locate the precise prior right claimed or where our adversary finds it, but it is that or nothing. Unless he has such superior right his action fails upon the merits. If he has such right, action therefor was barred before suit. He declares that he had such right more than ten years before suit, and he must stand or fall by his declaration. No other judgment can be rendered upon the demurrer.

At page 3 of the reply brief, filed October 16, 1900, plaintiff quotes an isolated and an abstract extract from Marquez *v.* Frisbie (101 U. S., 473–5), as authority for

> "It follows, therefore, that the suits before the court could not have been commenced while the matters involved were still *in fieri*, before the Land Department, and that, therefore, the statute of limitations could not begin to run until title passed out of the United States."

The whole opinion, so far as applicable, seems to support just the opposite view.

This was an action brought by a pre-emption settler *in possession* against the railroad company and its grantee who had secured a decision, *not then final*, in their favor and against this settler, in the Land Department, "praying a decree of the court declaring him to be its true owner, and his right to the title paramount," and there was a prayer, as in the case at bar, that defendants should be declared to hold the land in trust for plaintiff, and be compelled to convey the same accordingly, etc., etc. The court, Mr. Justice Miller rendering the opinion, held that this must refer to the legal title (plaintiff, the settler, be-

ing in possession), which defendants had not, and which had not passed out of the United States, while the whole matter of such *title* was still undetermined before the land officers.

The court qualifies the quotation in our adversaries brief, by saying:

> "*We did not deny the right of the courts to deal with the* POSSESSION *of the land, prior to the issue of the patent, or to enforce contracts between the parties concerning the land.* But it is impossible thus to transfer *a title* which is yet in the United States."
>
> "If, however, we could suppose that defendants had obtained the patent which the Secretary has decided they are entitled to, that patent and the order on which it issued has in its favor all the presumptions which such an instrument necessarily carries, to which is to be added in this case the plaintiff's allegation that it was founded on a decision made after full contest and repeated hearings, by appeal and otherwise, by the officers to whom the law has specially confided the adjudication of that class of cases.
>
> "The rule which governs the courts in the effort to correct any error in such decision has been so repeatedly stated here as to leave no room for doubt or misconstruction.
>
> "That principal is that 'the decision of the officers of the Land Department, made within the scope of their authority, on questions of this kind, are in general conclusive everywhere, except where considered by way of appeal within that department; and that, as to the *facts* on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question."

Then follows the quotation at page 2 plaintiff's reply brief, which also is qualified by the succeeding paragraph of the opinion:

> "The language of this court in Moore *v.* Robbins cited above is that equity will interfere 'when it is *clear* that these officers have by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.'
>
> "The meaning of this, and the sound principle, is that when it is a mixed question of law and of fact, and when the court cannot so separate them as to see *clearly* where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

No one can take the record, of which the Land Decisions and Reports must be considered part—for they are public records that courts will notice—and say that the first indemnity limits are insufficient to fully satisfy any deficiency either existing or ascertained to exist in place limits. Whatever may be the fact, it is certain that no one *knows* that they are insufficient, and the entire record which contains no averment that any deficiency has been *ascertained* seems to establish that the real deficiency is very small and not nearly the area of vacant and unappropriated lands in the indemnity limits. The R.R. Co. seems to fear an ascertainment of the exact deficiency, while the land department denies that any insufficiency has been ascertained or exists. Is this not a decidedly mixed question of law and fact?

In Marquez *v.* Frisbie, as in these cases, the sufficiency of the pleadings was attacked, and the court concluded:

> "We are hardly inclined to believe that if everything so stated is to be treated as absolute verity that it makes out his right. But it is sufficient to say that plaintiff also shows that all his proofs, together with those on the other side which he has *not* set out in his petition, were submitted to and passed upon by the land officers, from the register and re-

ceiver up to the Secretary of the Interior, and they decided against the validity of his claim."

And the patent was sustained for want of such mistake of law or fraud as would "justify the interference of a court of equity."

Marquez *v.* Frisbie declares that the court had *not* decided that suit for *possession* could not be brought during the pendency of proceedings in the Land Department in such positive terms as to make it an authority for such suit, were authority wanting.

Encumbering the record with a multitude of allegations and prayers about matters pertaining to suits to quiet title, etc., cannot distract attention from the real issue.

In paragraph XIII, p. 8, Record No. 49—

> It is recited that the N. P. R.R. Co., "became the owner in fee simple of the lands."

In paragraph XIV, p. 9, Record No. 49, appears—

> "That the N. P. R.R. Co. became the owner in fee and entitled to the immediate and exclusive *possession* of said lands and the whole and every part thereof." Similar averments are in the other cases.

The conclusion of the prayer for relief (XXI, p. 13, Record No. 49) is—

> "That plaintiff be adjudged entitled to the immediate and exclusive *possession* of said premises and the whole and every part thereof, *and be put in possession thereof by order of this court.*"

That is the meat in this suit—"*possession*"—and however we may lay aside the matter of legal title, some one was entitled to possession from April, 1882, when the settlement was initiated. The Government was not entitled, and

has so decided in the contest of this entry, which according to Marquez *v.* Frisbie, is conclusive. No legal objection having existed to a suit by the railroad company, or its grantee, they are barred by the statute unless they sued in time. It cannot be denied that every one concerned knew of the settler's adverse, open, and notorious possession in ample time, for the contest record shows this, and the company's grantee bought with full notice of the pending contest and prior settlement and possession, therefore stands in the railroad company's shoes. The record forestalls every excuse that might be offered for delay in suing the settler.

There has not been the gap of one day since April, 1882, in which the settler has not been in possession of the lands in controversy in Nos. 48 and 49 (he was ousted in No. 34), through settlement, cultivation, occupation, formal entry, final proof and patent. It has been his *home* for 18 years. He held under title or color of title. His was "a claim or right." Whoever had any better right to possession, and to whom the courts were open, has lost his right to sue for such possession by intervention of the statute that, in the interest of repose, conveys title even to a trespasser.

Presumably, the railroad company, if it had rights, was in constructive possession before 1882, but if so (the record is silent) was ousted.

From whatever date the company's "right" is considered, such right has not been continuous. A gap has occurred during which the settler's right could have attached, *and did attach*, more than ten years before the filing of suit.

N. P. R.R. Co. *v.* Colburn, 164 U. S. 385;
St. Paul & Pac. R. Co. *v.* N. P. R. Co., 139 U. S. 1;
Deseret Salt Co. *v.* Tarpey, 142 U. S. 241;
2 Ballinger's Code (Wash.), secs. 4797–4907.

SELECTION AND APPROVAL NECESSARY IN INDEMNITY LIMITS.

But the effort to avoid the statute of limitations has forced our adversaries to an admission of our uttermost contention respecting selection.

At page 2 of their reply brief, filed October 16, it is said:

> "The law was settled in the decision in Wisconsin Central Railroad Company *v.* Price County (133 U. S. 496), that *the title to indemnity lands does not pass until the approval of the selection by the Secretary of the Interior.* But it does not follow that a prior right cannot be initiated by selection which will be protected and enforced against one who receives a patent upon an entry subsequently initiated. This court enforced such a right in St. Paul and Sioux City R.R. Co. *v.* Winona and St. Peter R.R. Co. (112 U. S. 720), and St. Paul and Pacific R.R. Co. *v.* N. P. R.R. Co. 139 U. S. 1)."

That leaves in the cases only grantees' "prior right that might have been initiated by selection."

The full meaning of that expression is a little obscure, so long have we associated the "initiative" with the first move; the beginning; the start; the introductory step (see Standard Dictionary), but unless it means that a selection, like a homestead entry that relates back to the original settlement, may be referred to something in the case antedating the 1882 settlements, it is an abstract axiom. There is nothing in these cases of date earlier than the settlements except the grant, two or three general route locations, the first definite location of the line of road which was in lieu, therefore an abandonment, of the general route location, and itself abandoned by the *final* definite location, and the withdrawal that was afterwards revoked as from the beginning. All the homestead filings, with one exception, antedated selections.

Were the contention true that the alleged withdrawal had the effect to create a condition during which no valid pre-emption settlement in the indemnity limits could be made, nevertheless that would not better the railroad company's "right or title." The withdrawal keeps off unauthorized persons until the railroad company can *duly* select, but creates or declares no right or title in the company; while a withdrawal that has been revoked is a nullity.

It is clear that the grant creates rights only within the place limits, with an equitable promise to supply *ascertained* deficiencies out of the indemnity limits after their *approved* selection, in the meantime authorizing homestead settlements. Therefore,

(1). The granting act created no "prior right" in the indemnity lands.

(2). The withdrawal could not create such "prior right," and, having been revoked so that it was as if never made, it did not interfere with settlement.

(3). The selection was not made until after the settlement rights had been fully fixed, rights that ripened into patent, and was not approved even then; so, in law, there never has been a selection.

The rule in Wisconsin Central Railroad Company *v.* Price County (133 U. S. 496), is not, in terms, overruled or questioned in St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S. 1), a suit between two railroad companies to determine conflicting or overlapping grants, in which was involved no settlers' rights; and the case of the Northern Pacific Railroad Company *v.* Sanders (166 U. S. 620), follows the Wisconsin Central Railroad Company *v.* Price County case (*supra*), while U. S. *v.* Mo., Kan. & Tex. R.R. Co. (141 U. S. 376), fully discussed in 14 L. D. 591–2, de-

clares specifically that St. Paul and Pacific R.R. Co. *v.* N. P. R.R. Co. (*supra*), is an *exception* to the rule and inapplicable to the case at bar.

Failing to show any "prior right" by grant, withdrawal or selection, which clearly and indisputably is this record, the admission above quoted is the end of the controversy. There has been no withdrawal or selection, and the grant does not execute itself in indemnity limits.

THE INTENDED AREA OF THE WHOLE GRANT, OR GRANTS.

A query arose during the argument respecting the length and breadth of the tract within which lands of the primary and first and second indemnity locations were to be found. This was stated by counsel for the settlers in round numbers as 2,000 miles long by 120 miles wide, while our adversaries were of opinion that 1,800 miles better expressed the length. The distance from St. Paul to Tacoma is 1,909 miles (World Almanac, 1900), but, according to Henry Clews Investment Guide (1899), the length of the Northern Pacific Railroad Company is—

Main line.....	2,346.98 miles.
Branch lines.....	2,033.20 miles.
Making a total of.....	4,349.98 miles

of road, for which were appropriated, excepting a short distance across Minnesota, if we are to be guided only by the Act of July 2, 1864, or the Resolution of May 31, 1870, the odd sections in a strip 60 miles on either side of the road, that is, 120 miles wide, if necessary, equivalent to a solid body of land over 4,000 miles long and 40 miles wide (say 114,000,000 acres), or an area nearly equal to the original thirteen colonies. Our adversaries claim a solid body of land, or its equiva-

lent, 40 miles wide along the line of the road for its entire length, whatever that may be, deducting the amount within organized states wherein the width is but 20 miles. Perhaps the generally understood area of the grant is not over half or one-third the above estimate; even then immense, but, computing only from the statute—and our adversaries "demand the strict letter of the bond"—these figures are substantially correct, and the exact area of either place or indemnity limits has not been *ascertained*. If a discrepancy of fifty or sixty million acres between the statute and the fact exists as to the entire grant, and of the difference between some three million acres deficiency as stated in the complaint herein and not over 4,011 acres as stated with equal positiveness by the Land Department, it is manifest that the company's long delay in locating and building the road should not be permitted to create a deficiency that must have been ascertained before it can have legal status anywhere, nor support a suit based upon such deficiency until the deficiency shall have been ascertained in the only manner provided by law. The complaint lacks this averment.

The Department of the Interior denies the deficiency, and this department is sole judge of the fact. Whatever may be the true extent of the grant, it was so boundless that nearly eleven million acres are claimed to have been lost from it through the entries of predatory settlers; and it is no wonder that Secretary Lamar should have said in 6 L. D. 91, that—

> "A monopoly for an indefinite period of a vast part of the public domain (was) not contemplated by the grant."

Or that Secretary Vilas should have followed this in 7 L. D. 122, with—

> "The aim of this language was, as I am forced to read it, toward the availibility of all lands not granted.
>
> "It was a vast grant, and even as so limited, a threatening shadow on the settlements of the Northwest. Well might Congress say, 'the lands granted you shall have, but you shall tie up no more from the actual settler to the prevention of development.'"

The expression in the "reply brief" following the suggestion that "no hardship would result to the entryman through the loss of these suits," because he could relinquish his home and "move on," to some wild land, probably in Canada, for none appears nearer, according to the complaint, and that "the act of July 1, 1898, is sufficiently broad to afford substantial relief," is a delicately veiled bit of irony. The railroad company has carefully provided against doing equity, for it has not to relinquish lands it has sold. This explains the apparently reckless purchases of these disputed homestead entries encumbered with law suits. Sales have been made in *each* of the four cases at bar. If sales have as prudently been made throughout all the grant, and this is a far-seeing corporation, "it is (*not*) manifest that the provisions of the act are such as to allow the vast majority of settlers to retain their land."

Six feet of ground will sometime offer permanent relief to such of us as may not previously have been cremated or drowned, but we don't see quite how that could be pleaded in satisfaction of a settler's home whose present value is beyond any dollar-and-cents measurement.

To the criticism that—

> "The suggestion of counsel that a decision by this Court affirming the validity of the withdrawal orders, would have the effect of dispossessing a large number of settlers is without foundation,"

we beg to recur to the sales of *each tract* of land involved herein. *Every* settler before this Court would be dispossessed; and these are test cases. It is fair to assume that the others "are like unto the first."

Our adversaries first brief, at page 50, closes with the assertion that a selection was unnecessary. Their third brief commences, at page 2, with the positive assertion that—

> "The law was settled by the decision of this Court in Wisconsin Railroad Company *v.* Price County (133 U. S. 496), that the title to indemnity lands does not pass until the *approval* of the selection by the Secretary of the Interior."

The argument of the statute of limitations has borne unexpected fruit.

The bulk selections of 1883 and 1884 were abandoned when the company filed the second selection covering the tract in question in 1887.

This question is dealt with and decided by the Secretary of the Interior in La Bar *v.* Northern Pacific, 17 L. D. 406. Here the Department was dealing with a settlement claim on an odd section within the indemnity limits of the Northern Pacific in the Fargo land district. In referring to the so-called second list of selections filed by the company on October 12, 1887, the Secretary declares that this latter list contains 7,900.78 acres less than the list of 1883, and the losses are correspondingly reduced. He then proceeds as follows:

> "In this connection I will state that an examination of the two lists shows that different losses are substituted in the second list, and like the first list,

the losses are not arranged tract for tract with the selected lands. The question arises, then, what is the effect of the filing of this second list upon claims attaching prior to the filing of the same? It is plain that it was intended as a substitute or amendment of the old list, and on account of its variance therefrom must be treated as an abandonment of the old list, for the company cannot stand on two lists specifying different losses as a basis therefor. It may be urged that such variance is but slight—that is, that the losses are the same with the exception of a few thousand acres, but, as neither list is arranged tract for tract, it cannot be said to which tract the variance applies. When La Bar settled on October 1, 1887, he settled subject only to the selection of 1883, which, having been abandoned, removes any bar against his settlement. A point of time must elapse between the substitution of the lists, and La Bar being a settler, his right attached upon the instant, and bars subsequent selection on account of the grant."

If the 1883 and 1884 selections were abandoned in 1887, then it must be held that between the filings in 1883 and 1884 and the date of abandonment, the selections had no power to reserve the lands from settlement claims. When the second selection (1887) was made, the withdrawal of the indemnity limits had already been cancelled. The withdrawal and the bulk selections of 1883 and 1884, being thus out of the way, the settlement claims, all of which were made previous to the second selection, attached to the various tracts, the settlers being on the ground and asserting their claims when the second so-called selection was made.

Were the losses in the granted limits so great that the odd-numbered sections in the indemnity limits were insufficient to supply them?

In cases No. 48 and 49, such allegation is attempted to be made in the bill of complaint, and in case No. 34, the record contains in the stipulated facts on page 38 what purports to be a certificate by Commissioner Lamoreux stating in substance that in the granted limits there would be a deficiency of 3,559,222.78 acres which could not be satisfied from the *first* indemnity limits.

It is upon this pretended certificate that counsel for defendant, in case No. 34, base their claim, set up in the last clause of their brief, that no selection in the indemnity limits was necessary—the odd-numbered sections therein being appropriated to the R.R. Co., without such selection. To show that the certificate of the Commissioner found in the record of 34, is unreliable and of no importance, we call the attention of the court to Senate Document No. 150, 54th Congress, Second Session, in which the Commissioner of the Land Office reports the deficiency in the entire grant at 559,889.99 acres. And in N. P. R.R. Co., 25 L. D. 511, the Secretary declares that on November 5, 1897, the Commissioner reported the approximate deficiency in the entire grant at 530,573 acres. The so-called certificate of Commissioner Lamoreux is dated October 5, 1896. It elsewhere appears as May 2, 1896. The report to the Senate found in Document No. 150, was made Feb. 23, 1897. It thus appears that the Commissioner of the G. L. O. was making *guesses* only, but which had the semblance of being in good faith, as the deficiency was given to the fraction of an acre.

To show that these foregoing statements were the result of computation without any sufficient basis, it is enough to say that a large proportion of the lands lying within the granted limits have never yet been surveyed, and the same is true of a large proportion of the lands

within the indemnity limits. Hence there was no basis for stating the losses in the primary limits, nor the amount of land available for indemnity in the outer limits. This fact, that the surveys had not then and have not now been completed, is within the knowledge of the court, and was stated by counsel for the R.R. Co., in response to an inquiry from one of the justices during the oral argument.

On page 5 of the report of the Secretary of the Interior for the fiscal year ending June 30, 1899, the Secretary calls attention to the late report of the Commissioner of the General Land Office with regard to this Northern Pacific, grant, and states that such report "purports to give definite statements with respect to the status of the grant to the Northern Pacific, but the Commissioner's attention being called to r[illegible] unsettled and litigated questions, in advance of the sett[illegible]nt and adjudication of which no definite statement of the status of the grant is possible, he has submitted a supplemental report which concludes as follows:

> "In conclusion, I have the honor to state that the portion of my report which relates to this subject was written for the purpose of giving information to the Department relative to the character and quantity of the work performed and the results accomplished during the fiscal year, and without any intention of making an authoritative statement as to whether or not the Northern Pacific grant by the Act of 1864 could be satisfied.
>
> "In view of the large quantities of unsurveyed lands within the grant, and of the uncertainty of their availability for use in the satisfaction of it; of the litigation pending involving lands within the conflicting limits aforesaid and the true eastern terminus of the grant, and considering the proceedings now in progress under the Act of July 1, 1898, and the right of selection for lands within the Mount Rainier forest

reserve under the Act of March 2, 1899, and the prospect of the creation of other forest reserves within the limits of the grant, *I am of opinion that it cannot at this time be stated with any degree of certainty that there are or are not sufficient lands available to satisfy the Northern Pacific grant under the act of* 1864."

In addition to all this, the Secretary found in N. P. R.R. Co., 25 L. D. 511 *et seq.* (*supra*), and in N. P. *v.* Streib, 26 L. D. 589, that there has never been any ascertained deficiency in the grant to the Northern Pacific showing that it could not be satisfied by obtaining the available lands in the indemnity limits. In 25 L. D. just cited, the Secretary sets out the conflicting statements made by the Commissioner concerning the matter of deficiency, and declines to make a decision to the effect that a deficiency has been established. And in 26 L. D. the Secretary says: "Relative to the certification of a deficiency in the grant to this company (the Northern Pacific) made by your predecessor, it is sufficient to say that this Department has never given recognition to that certificate, nor has the Company been relieved from the specification of losses in making indemnity selections on account of an ascertained deficiency in the grant."

SUMMARY.

The questions raised by the supplemental briefs filed by the R.R. Co., on behalf of its grantees in these various cases, may be stated as follows:

First. If the withdrawal of the indemnity limits was illegal, then the rights of the plaintiff in 34, and the defendants in 48 and 49, attached to the various tracts upon settlement, and were properly ripened into patents.

Second. If the so-called bulk selections of 1883 and

1884 were not such a compliance with the law and regulations as to selections, as to appropriate the lands for the benefit of the R.R. Co., and reserve them from settlement rights, then, and in that event, as soon as the withdrawal was revoked (Aug. 15, 1887) the settlers being upon the tracts improving them and claiming them in good faith, their rights immediately attached. All these settlers were on the lands *before* the 1883 and 1884 selections.

Third. If the withdrawal of 1873 should be held sufficient to bar the inception of settlement rights during its pendency, and if the so-called selection of 1883 was sufficient to reserve the lands from settlement claims after the withdrawal had been revoked, yet if the filing of the so-called selection in 1887 was, on the part of the R.R. Co., an abandonment of the previous selection, then, and in that event, the settlement claims were properly patented, as all the settlers were on their respective tracts previous to the said second selection.

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Of Counsel for Plaintiff in Error in No. 34.
GEORGE TURNER,
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Nos. 34, 47, 48 & 49.

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Sup. Ct. U.S. Oct. Term for Defts. Error in 34 & P.Es. in other cases

OCTOBER TERM, 1900.

No. 34.

FRED HEWITT,
Plaintiff in Error,

vs.

EMIL SCHULTZ, et al.

Filed Oct. 11, 1900.

No. 47.

WILLIAM L. POWERS, et al.,
Plaintiffs in Error,

vs.

JACOB SLAGHT.

No. 48.

J. M. MOORE,
Plaintiff in Error,

vs.

D. B. STONE, et al.

No. 49.

J. M. MOORE,
Plaintiff in Error,

vs.

JOHN CARMODE,

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR IN NO. 34 AND PLAINTIFFS IN ERROR IN NOS. 47, 48 AND 49.

C. W. BUNN and
JAMES B. KERR,
Of Counsel.

5054

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SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR IN NO. 34 AND PLAINTIFFS IN ERROR IN NOS. 47, 48 AND 49.

We purpose in this additional brief to set forth succinctly, separate from other considerations, the

ruling of Secretary Vilas in the somewhat celebrated *Guilford Miller* case, 7 L. D. 100, followed by Secretary Smith in *Northern Pacific Railroad Company v. Davis*, 19 L. D. 87, and our own views upon the points decided in those cases.

Sections 3 and 6 of the Northern Pacific act of July 2, 1864, read as follows:

> "Sec. 3. *And be it further enacted*, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections * * *.

Sec. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act, but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

Secretaries Vilas and Smith, in the cases above referred to, (a) express doubts as to there being generally any implied power of executive withdrawal, and (b) hold two propositions of law applicable specially to the Northern Pacific grant: *first*, that in section 6 is an express reservation or withdrawal of place lands, which is by implication a negative upon any implied authority in the Secretary to withdraw indemnity lands, even if such power would otherwise be held to exist; *second*, that section 6 contains an express extension of the pre-emption and homestead laws "to all other lands on the line of said road when surveyed," which is

said to include *both even and odd sections within the indemnity belt.*

I.

THE IMPLIED POWER OF WITHDRAWAL.

Section 3 of the act makes a grant of quantity and it is clear that congress, in providing an indemnity belt, intended it should be more than a promise to the ear, and that it should be available to fill the losses in place lands. It is also clear that the lands in the indemnity belt could not be available for this purpose under the rule declared by the Secretary in the Miller case.

By act of June 2, 1862 (12 Stat. 413) congress had extended the right of pre-emption to unsurveyed as well as surveyed lands, and but for the exercise of the power of executive withdrawal, the entire indemnity belt of the grant would have been subject to appropriation for a long period, during which the company could have made no selection.

The right of selection was in terms limited to odd-numbered sections, and until the indemnity lands were surveyed the odd sections must remain unascertained.

It appears that even under the protection of withdrawals the lands in the indemnity limits fell far short of being sufficient to satisfy the losses.

That congress intended the right of indemnity conferred by the act of 1864 to be a substantial right is shown by the passage of the joint resolution of May 31, 1870 (16 Stat. 378). By this resolution the

company was given the right in any state or territory to select odd-numbered sections of land within ten miles beyond the limits prescribed in the act of 1864, in lieu of lands lost from the place limits between the date of the grant and the date of definite location, wherever the area of the first indemnity belt was insufficient. It is not reasonable to suppose that congress conferred a right of selection by the act of 1864, which was a barren right without the usual protection of an executive withdrawal, when within six years it gave such plain evidence of its intention that the company should receive the full quantity of land which the act purported to grant.

The implied power of withdrawal in aid of works of public improvement is a necessary power well settled to exist. *Wolcott v. Des Moines Company*, 5 Wall. 681; *Grisar v McDowell*, 6 Wall. 363; *Williams v. Baker*, 17 Wall. 144; *Wolsey v. Chapman*, 101 U. S. 755; *Dubuque, etc., Railroad Company v. Des Moines, etc., Railroad Company*, 109 U. S. 329; *Cedar Rapids, etc., Railroad Company v. Herring*, 110 U. S. 27; *St. Paul, etc., Railroad Company v. Winona, etc, Railroad Company*, 112 U. S. 720; *Buttz v. Northern Pacific Railroad Company*, 119 U. S. 55; *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1; *Bullard v. Des Moines and Fort Dodge Railroad*, 122 U. S. 167; *Hamblin v. Western Land Company*, 147 U. S. 531; *Riley v. Welles*, 154 U. S. 578; *Wood v. Beach*, 156 U. S. 548; *Wisconsin Central Railroad Company v. Forsythe*, 159 U. S. 46; *Spencer*

v. McDougal, 159 U. S. 62; *Northern Pacific Railroad Company v. Musser-Sauntry Company*, 168 U. S. 604.

It is the same as the power of withdrawal by the president, exercised without challenge in numerous cases for a hundred years, in establishing reservations for military purposes and for the Indians and for other purposes. See with reference to Indian reservations report of Public Land Commission, 1883, pages 240 to 243; with reference to military reservations report of Public Land Commission, pages 249 to 264. See also with reference to reservations for reservoirs at the head waters of the Mississippi in Minnesota and of the St. Croix in Wisconsin, report of Public Land Commission, pages 676 to 678. In the report of the Commissioner of the General Land office for the year 1888, pages 232 to 241, appears a statement of more than three hundred and fifty withdrawals on account of railroad grants covering a period of nearly forty years.

In *Wilcox v Jackson*, 13 *Peters*, 498, the court considered the effect of a reservation in 1804 by the War Department of a tract of land for military purposes and for an Indian agency, and held that this was a reservation by the President and took the land out of the operation of the pre-emption law. And in *Wolsey v. Chapman*, 101 U. S. 755, 769, this court held that an order by the Commissioner of the General Land Office constituted a reservation "by proclamation of the President."

In the case of *Grisar v. McDowell*, 6 Wall. 363,

this court passed upon the effect of an order made by the President of the United States through the War Department in 1850, reserving a tract of land for military purposes. Considering the authority of the President to make this order, the court said (p. 381):

> "But further than this: from an early period in the history of the government it has been the practice of the president to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.
>
> The authority of the president in this respect is recognized in numerous acts of congress. Thus, in the pre-emption act of May 29th, 1830, it is provided that the right of pre-emption contemplated by the act shall not 'extend to any land which is reserved from sale by act of congress, *or by order of the president*, or which may have been appropriated for any purpose whatever' (4 Stat. at Large, 421.) Again in the pre-emption act of September 4th, 1841, 'lands included in any reservation by any treaty, law, *or proclamation of the president* of the United States or reserved for salines or for other purposes,' are exempted from entry under the act (5 Id. 456). So by the act of March 3d, 1853, providing for the survey of the public lands in California, and extending the pre-emption system to them, it is declared that all public lands in that state shall be subject to pre-emption, and offered at public sale, with certain specific exceptions, and among others 'of lands appropriated under the authority of this act, *or reserved by competent authority*' (10 Id. 246). The provisions in the acts of 1830 and 1841 show very clearly that by 'competent authority' is meant the authority of the president, and officers acting under his direc-

tion. (*Wolcott v. Des Moines Company*, 5 Wall. 688)."

In the case of *Wolcott v. Des Moines Company*, 5 Wall. 681, the following facts appeared: By act of congress of August 8, 1846, there was granted to the then territory of Iowa:

> "For the purpose of aiding said territory to *improve the navigation of the Des Moines river from its mouth to the Raccoon Fork*, so-called, in said territory, one equal moiety in alternate sections, of the public lands, in a strip five miles in width on each side of the river."

It appeared that the Des Moines river flows from the northern boundary of Iowa and empties into the Mississippi river at the southeast corner of the state, and receives the waters of the Raccoon Fork about the middle of the state. The extent of the land grant under this act was the subject of continuous conflict of opinion. For a time it was held by the officers of the land department that the grant extended the full length of the Des Moines river in the territory, and then that it extended only to the mouth of the Raccoon Fork. The courts were also divided upon the question until the latter construction was finally placed upon the act by this court in *Railroad Co v. Litchfield*, 23 How. 66. By the terms of the grant, the lands inuring to the territory were to be selected subject to approval of the secretary of the treasury, and, under the construction of the act that the grant extended above the Raccoon Fork, thousands of acres so situated were patented under the grant and all of the odd numbered sections within five miles of the river

above Raccoon Fork were withdrawn. Then came the decision by this court, holding that the grant did not extend above Raccoon Fork. The validity of the executive order of withdrawal of the odd-numbered sections above the Fork was presented in this wise: May 15, 1856, congress passed an act granting to the state of Iowa to aid in the construction of certain specified railroads, every alternate section (designated by odd numbers) for six sections in width on each side of said roads, with the following proviso:

> "That any and all lands heretofore reserved to the United States by any act of congress, or *in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements, or for any purpose whatsoever*, be and the same is hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of the said railroads through such reserved lands."

It was contended that this grant to the state for the benefit of the railroads passed title to the lands covered by the executive withdrawal above Raccoon Fork. It was admitted that these lands passed unless excluded by the proviso. The court sustained the validity of the withdrawal, and said:

> "It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior,

after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the president and cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the land department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty of the land office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by congress for any of these public purposes to a state, notice is given by the commissioner of the land office to the registers and receivers to stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

To the same effect is *Wolsey v. Chapman*, 101 U. S. 755, and *Riley v. Welles*, 154 U. S. 578, where the same withdrawal is considered.

II.

THE FIRST POINT DECIDED BY THE SECRETARY.

We have endeavored to show that the right of indemnity conferred by the grant was unavailable without the usual withdrawals by the executive, and that this implied power exists from necessity and has been exercised without question for a century.

This power of withdrawal, based, as this court has said, on necessity, we should expect to find in case of the Northern Pacific grant. And, as it is a power usual and necessary, it must be held to exist here, as in other grants, unless Congress has quite clearly and explicitly stated to the contrary. This well recognized power cannot be denied in the administration of the Northern Pacific grant, in the absence of a plain and unmistakable negative of the power by congress. The secretary of the interior finds in the provisions of section 6, creating a withdrawal *of place lands on general route,* evidence that this withdrawal was intended to be exclusive of any withdrawal of *indemnity lands after definite location.*

The language of the sixth section, operating to effect a preliminary withdrawal, when the general route is fixed, of all odd-numbered sections of land within forty miles of the line of general route, is

passed on in *Buttz v Northern Pacific Railroad Company* 119 U. S. 55, as follows:

> "The sixth section declares that after the general route shall be fixed, the president shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road and that the odd sections granted shall not be liable to sale, entry or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith and information thereof given to the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

And immediately following, in the same opinion, the court declares the purpose of this preliminary legislative withdrawal:

> "The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is by virtue of these provisions, so construed by this court, that the Secretary concludes, that it was the intention of congress that no withdrawal of *indemnity* lands should be made after the *definite* location of the road. He says:

> "Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive."

The Secretary loses sight, not only of the particular purposes for which this withdrawal on general route was provided, but of the intent of the whole act, as apparent from its liberal terms and a consideration of the circumstances under which the grant must be adjusted and which congress must have anticipated.

The preliminary withdrawal was for the purpose of securing the company between the time of filing its map of general route and its map of definite location. It was, of course, in contemplation that the general route of the road would be located within a comparatively short time after the passage of the granting act, but that it would require a much longer period to complete the explorations and accurate surveys necessary to a final definite location of the line. This, in fact, turned out to be the case, for, although the maps of general route were filed in 1870, 1872 and 1873, the final maps of definite location were not filed until 1884. The preliminary withdrawal of forty miles on each side of the line of general route, provided by congress to remain in force up to the time of definite location, was amply sufficient to substantially secure the rights of the company during that period. The line of the road being only approximately determined by the map of general route, lands in the indemnity belt, not then ascertained as such, would have a very remote speculative value, and the rush of settlers to appropriate these lands, induced by the prospect of a railroad and the consequent development of the country, could not have been looked

for until the date of the definite location, when, for the first time their proximity to the railroad would be assured.

Moreover, the indemnity belt was not fixed by the *general* route map. It could be determined only after *definite location*. The two classes of lands are radically different. To place lands the title passed upon definite location; but to indemnity lands the title passed only upon selection lawfully approved. The two withdrawals are entirely distinct and do not depend on the same reason or principle. Therefore there is no legitimate inference that congress, by providing withdrawals of *place* lands on filing map of *general* route, intended to prohibit the secretary from exercising his accustomed power to withdraw *indemnity* lands after the *definite* location was made.

It is submitted that this preliminary legislative withdrawal, instead of evidencing an intention on the part of congress, that this exercise of the power of withdrawal should be exclusive, shows a disposition to protect the company in its full rights under the grant. As before stated, the withdrawal on general route was ample to protect the company up to the time of the definite location of its line, when its present grant of lands in place took effect and the limits of its indemnity belt became fixed. When this point was reached the function of the withdrawal on general route was fulfilled and at the same time by the terms of the grant, the right of selection of indemnity arose, the direction of which was expressly committed to the secretary of the interior.

Referring again to the case of *Wolcott v. Des Moines River Company*, 5 Wall. 681, it will be observed that the court says that the granting act there under consideration *"carried along with it, by necessary implication, not only the power, but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated."*

A careful examination of the act there in question (August 8, 1846, 9 Stat. 77) discloses that the provision referred to by the court was the requirement that the lands granted should be selected by an agent of the territory, *"subject to the approval of the secretary of the treasury of the United States."*

Place this provision side by side with the provision of section three of the Northern Pacific granting act, giving the right of indemnity, which is as follows: *"other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior;"* and the conclusion follows that the Northern Pacific grant carried with it not only the power, but the duty to reserve the indemnity lands for the benefit of the company.

The proposition laid down by the Secretary of the Interior where he says:

> "Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive,"

meets with a conclusive answer in the case of *Wood v. Beach*, 156 U. S. 548.

In this case Wood attempted to acquire land as a homestead which was within the indemnity limits of the grant to the Leavenworth, Lawrence & Galveston Railway Company, and also within the like limits of the grant to the Missouri, Kansas & Texas Railway Company. The land had been withdrawn under both grants by departmental orders before the settlement of Wood. After citing, with approval, the Des Moines river cases, the court says of the withdrawals for the benefit of the railroad companies:

> "These withdrawals were not merely executive acts, but the latter one, at least, was in obedience to the direct command of congress. Section 4 of the act granting lands to aid in the construction of what is now known as the Missouri, Kansas & Texas Railway (14 Stat. at Large, 290) is as follows.
>
> 'Sec. 4. And be it further enacted, that, as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of said secretary to withdraw from the market the lands granted by this act in such manner, as may be best calculated to effect the purposes of this act and subserve the public interest'."

The grant for the benefit of the Missouri, Kansas & Texas road was a place grant of the odd-numbered sections within ten miles on each side of the line of road with a right of indemnity selection within twenty miles. The withdrawal thus sustained by this court was of indemnity lands.

Section 6 of the grant to the Northern Pacific Railroad Company provides that, after filing the map of general route, "*the odd sections of land*

hereby granted shall not be liable to sale, entry or pre-emption." This is the congressional withdrawal which the Secretary of the Interior insists must be held to be exclusive of any withdrawal by a subordinate authority. But in *Wood v. Beach*, a direction to the Secretary to withdraw from market "*the lands granted by this act,*" was held not to exclude his authority to withdraw indemnity lands. If it be contended that indemnity lands are "*lands granted,*" then the land in controversy was withdrawn by virtue of the provisions of section 6 above noted, but if indemnity lands are not "*lands granted,*" then a statutory withdrawal of granted lands does not exclude the authority of the executive to withdraw indemnity lands.

In construing this grant in *Northern Pacific R. R. Co. v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 26 Fed. 551-554, Mr. Justice Brewer, sitting at circuit, indicates the rule which must control its construction. He says:

> "While the grant is vast, the line to be constructed in order to earn it, is continental. The grant was made because congress believed the public good required the road, and, in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it is *fairer to presume that congress intended the freest bounty rather than to believe* that it burdened the grant with extra exceptions which when construction became feasible might largely deplete it of value."

III.

THE SECOND POINT DECIDED BY THE SECRETARY.

The second ground on which the Secretary places his decision in the Miller case is, that Sec. 6 contains an *express* prohibition on executive withdrawals of land for indemnity. This conclusion is based on the theory that the section extends to the indemnity lands the pre-emption and homestead laws. The language relied on is this:

> "But the provisions of the act of September eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

Section 6, after providing for the survey of lands within forty miles of the line of general route, which was the limit of the place lands, says, (a) that the lands "hereby granted" shall not be subject to sale or entry or pre-emption; (b) that the pre-emption and homestead laws are extended to "all other lands on the line of said road when sur-

veyed;" and (c) that the reserved alternate sections when offered for sale shall not be sold for less than $2.50 per acre.

Does the extension of the pre-emption and homestead laws include, as held by the Secretary, the indemnity lands? We contend not and say that the extension of those laws was only to the *even alternate sections within the place grant.*

It is plain that the statutory withdrawal of "lands granted" contained in the immediately preceding sentence of the section applies only to place lands. *Buttz v. Northern Pacific R. R. Co.*, 119 U. S. 55. Then follows the provision in question extending the pre-emption laws to "all other lands on the line of said road when surveyed." What lands are meant by the words quoted? "All other lands *on the line of said road*" do not certainly mean lands very remote from the road, and where is the line to be drawn? The natural inference is "other lands" in contradistinction to the lands just spoken of as reserved for the company; that is the alternate even sections within the place grant. This conclusion is strengthened by the qualification "when surveyed." The preceding language in the same section required a survey of the place lands. No survey was mentioned, or so far as the act shows contemplated, of the indemnity limits. So it was the same lands to be surveyed, as before in the same section provided, which were to be open to entry and settlement. This conclusion is reinforced by the sentence following, which says that the reserved alternate sections shall not be sold at less

than $2.50 per acre. There can be no question that these reserved sections are the even sections in the place limits, and the expression is synonymous with "all other lands on the line of said road." It would be as reasonable to include lands in the indemnity limits in one class as within the other. That the even sections in the indemnity limits are not increased in price to $2.50 per acre is clear from the reason for which the increase in price was made, namely, to enable the government to make good from the sale of the reserved sections the value of the lands granted. And this is the construction of the Interior Department. 19 *Land Decisions*, 381.

An examination of the pre-emption law as then in force, and a reading of this particular portion of the granting act in connection with that law, will show almost to a demonstration that the construction contended for is not only unreasonable but impossible. The pre-emption law of September 4, 1841 (5 Stat. 453), in section 10, after declaring the qualifications and conditions for acquiring public lands by pre-emption and extending the operation of the act to all *surveyed* lands, proceeds to define certain classes of lands to which the pre-emption right shall not extend, including land reserved for the support of schools, lands included within the corporate limits of towns, lands on which are situated salines or mines, and

> "No sections of land reserved to the United States as alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement."

This exception of sections reserved to the United States alternate to others granted for the construction of canals, railroads or other public improvements, remained in force until March 3, 1853. At that time the following statute was enacted (10 Stat. 244):

"An act to extend pre-emption rights to certain lands therein mentioned,

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, that the pre-emption laws of the United States as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same, in soldiers' bounty land warrants, estimated at a dollar and twenty-five cents per acre, or in gold and silver or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction: *Provided*, that no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve such lands prior to the final allotment of the alternate sections to such railroads by the general land office. *And provided further*, that the price to be paid shall in all cases be two dollars and fifty cents per acre, or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres; *and provided further*, that any settler who has settled, or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the supreme court of the United States to be invalid,

> shall be entitled to all the rights of pre-emption granted by this act and the act of fourth of September, eighteen hundred and forty-one, entitled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights,' after the lands shall have been released from reservation in the same manner as if no reservation existed."

The effect of this act was to modify materially the restrictive clause in the act of 1841 withholding from the operation of the pre-emption law sections reserved to the United States, alternate to others granted for the construction of railroads and other public improvements. The plain reading of the act of March 3rd, 1853, shows that its effect was to remove the restriction contained in the pre-emption law of 1841, as to sections alternate to railroad lands, from the passage of the act up to the time of *"final allotment of the alternate sections to such railroads by the general land office."* The act was so construed by the rules of the general land office quoted below (1 Lester, p. 509):

SYNOPSIS OF RULES ADOPTED BY THE GENERAL LAND OFFICE FOR THE RAILROAD DESK.

> "First: By the act of 4th September, 1841 (No. 48). 'No sections of land reserved to the United States, alternate to other sections, granted to any of the states,' for the construction of any canal, railroad, or other public improvement,' are subject to the operation of said act. But—
>
> "Secondly: The act of 3rd March, 1853 (No. 222), and Act of 27th March, 1854 (No. 234), materially modify the restrictive or interdictive clause in the Act of 1841. The act of March 3d, 1853, steps in and partly takes off

the inhibition contemplated in Act of 1841 by extending the pre-emption laws, at a price of $2.50 per acre, 'over the alternate reserved sections of public lands along the lines of the railroads of the United States,' *where the party had settled and improved the land 'prior* to the *final allotment* of the alternate sections to such railroads by the General Land Office.'

"Pre-emptions under this Act of 1853, attach within the following periods, to the *United States reserved sections*: 1. From the date of the 'definite location' of the road (viz., according to Attorney General's opinion, February 16, 1857), *when the route is surveyed and staked off on the ground*, until the 'final allotment,' by the General Land Office, of the railroad sections, and that is the *date of official list* certifying the latter sections to the State.

"We take the 'definite location' of the route as the period when this Act of 1853, with its $2.50 price applies, for the reason, not only that such seems to be the current of official decisions, but because, up to such 'definite location' there really are no United States alternate sections so set apart, as would be notice, or grounds of inquiry to purchasers. 2. Pre-emptions will not attach under this law to the *United States alternate reserved sections*, after the date of 'final allotment,' to the day of offering at public sale, for the reason that the interdicting clause in the Act of 1841, *again applies* to the United States alternate reserved sections aforesaid, the Act of 1853 only taking it off up to the period of final allotment."

It will be observed further, that the act of March 3rd, 1853, although partially removing the restrictions of the pre-emption law as to alternate sections of railroad grants increased the price per acre at which these lands might be acquired during the period contemplated by the act of 1853, to $2.50 per acre. The right

of settlers to acquire lands within the limits of railroad grants alternate to the lands granted for the benefit of railroad companies, was governed by these two acts at the time of the passage of the act of July 2, 1864.

Prior to 1853, when the pre-emption law was extended, under the restriction noticed, to these alternate sections, all grants for the construction of railroads, canals and other public improvements, had been made, not to incorporated companies, but to states for the benefit of such companies as might thereafter be incorporated and should comply with the legislation of the respective states controlling the disposition of land granted to them.

Under the practice just indicated and in force in 1853, considerable time would necessarily elapse between the date of the grant to a particular state and the time when the company organized under the legislation of such state would earn the land and the state would become entitled to demand from the general land office that the land in question be certified to it. From the very beginning, whenever land was granted to states to aid in the construction of railroads, although the states usually took title by present grant, yet the condition was uniformly imposed that the lands should not be sold or conveyed until the road or the part thereof opposite to the lands had been constructed. The fact of the construction and its approval was evidenced by the allotment of the lands and their certification by the general land office.

The grant of July 2, 1864, to the Northern Pa-

cific Railroad Company, was one of the first instances of a departure from the former uniform practice of granting lands for railroads to states instead of directly to railroad companies. The grant to the Northern Pacific being in terms a present grant and its rights to the lands enuring upon the definite location of its line, the period contemplated by the act of 1853 during which the restriction contained in the pre-emption law was removed could not arise. The act of 1853 extended the operation of the pre-emption law over the alternate reserved sections up to the time when the granted lands should be finally allotted by the general land office. Under the provisions of the act of July 2, 1864, no period would arise during which the act of March 3rd, 1853, could operate. As indicated by the construction placed by the department on the act of 1853, the alternate reserved sections were open to pre-emption from the time of the definite location of a road to the time of final allotment, it being considered that no sections could be identified as "alternate reserved sections" until the definite location of the line. Under the act of 1864, the company took a present title, without "final allotment" by the land office, to its granted sections immediately upon the filing of its map of definite location, and to continue and extend the spirit of the act of 1853, the particular language under consideration was inserted in the grant to the Northern Pacific Railroad Company. Without an extension in terms of the preemption and homestead laws to the reserved alternate sec-

tions in the place limits, no rights to these lands could be acquired by settlers, and it is important to observe that the same policy has been followed in every grant since the passage of the Northern Pacific act:

> Grant to California and Oregon Railroad Company, act of July 25, 1866, section 2 (14 Stat. 239); grant to Atlantic and Pacific Railroad Company, act of July 27, 1866, section 6 (14 Stat. 292); grant to Stockton and Copperopolis Railroad Company, act of March 2, 1867, section 5 (14 Stat. 548); grant to Oregon Central Railroad Company, act of May 14, 1870, section 2 (16 Stat. 94); grant to Texas and Pacific Railroad Company, act of March 3, 1871, section 12 (16 Stat. 573).

In all of these grants by various provisions the pre-emption law was extended to the reserved alternate sections.

After concluding that section 6 forbade a withdrawal of indemnity lands, the Secretary assigns as a reason for the insertion of such a provision in the Northern Pacific grant, the fact that it was a grant of unprecedented magnitude and that congress did not intend that the large body of lands in the indemnity limits should be withheld from settlement. But the language so construed by the secretary is as before stated merely the equivalent of the provisions inserted in every other grant made direct to a railroad company without regard to the quantity of lands granted.

That the effect of these provisions and of the language in section 6 of the Northern Pacific act was to carry out the spirit of the act of March 3,

1853, and not to forbid a withdrawal of indemnity lands is demonstrated by an examination of the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company (14 Stat. 94). Section 5 of this act is almost word for word the same as section 6 of the Northern Pacific act. But the Placerville and Sacramento grant *contains no indemnity provision*, and the only possible purpose for inserting such language was in pursuance of the settled policy to cover the exception in the pre-emption law relating to the reserved sections.

And this was the construction placed upon section 6 of the Northern Pacific act before this exception of the pre-emption law was repealed in 1874 by the adoption of the Revised Statutes, and when the executive officers of the government were familiar with the history of legislation. The first interpretation put upon this language is found in a letter of Secretary Usher to the commissioner of the general land office, dated March 9, 1865, transmitting the so-called "Perham Map." This letter is quoted in the opinion in *Oregon & C. R. Co. v. U. S.*, 77 Fed. Rep. 69; 48 U. S. App. 6, and is as follows:

"Department of Interior.
Washington, D. C., March 9th, 1865.

"Sir:—

"Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the

granted lands along said line be withdrawn from market. In view of the provisions of the 3rd and 6th sections of the act of congress, approved July 2, 1864, (Pamphlet Laws, pages 368-369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. *The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of congress.*

"Very respectfully, your ob't servant,

"J. P. USHER, Secretary.

"The Commissioner of the General Land Office."

The concluding sentence of this letter shows that in 1865 the provisions of section 6 were understood to refer to the even numbered reserved sections.

The conclusion of the Secretary, that section 6 in terms extends the homestead and pre-emption laws to lands in the indemnity limits and forbids their withdrawal, is reached without a consideration of the acts of 1841 and 1853 here discussed, and furthermore without giving effect to the words "when surveyed," which occur near the close of the section.

This restriction, that the pre-emption and homestead laws should not extend to the alternate reserved sections until surveyed, is in full accord with the policy of the act of 1853, for in 1853 unsurveyed lands were not subject to pre-emption.

Furthermore, it is important to observe that, by the passage of the act of June 2, 1862, (12 Stat. 413), two years before the passage of the Northern Pacific granting act, the right of pre-emption was extended to all lands belonging to the United States, to which the Indian title had been, or should be, extinguished "under the conditions, restrictions and stipulations" contained in the pre-emption law of 1841. By this it will be seen that under the construction of section 6, act of July 2, 1864, contended for by the Secretary of the Interior, congress must be held to have enacted that the pre-emption and homestead laws should be extended to the unsurveyed lands situated in the indemnity belt of the grant to the company when surveyed, although two years earlier the same laws had been extended to these same lands while still unsurveyed.

IV.

THE DECISION OF THE SECRETARY IS CONTRARY TO THE SETTLED CONSTRUCTION OF THE ACT.

For nearly twenty years, the construction placed by the Interior Department upon the Northern Pacific grant was uniform and sustained the power of withdrawal of indemnity lands. Between 1871 and 1887 more than forty withdrawals of indemnity lands were made under this grant, and the authority to make such withdrawals remained unquestioned until the decision by the secretary

in the Guilford Miller case in 1888. The reports of land decisions by the Secretary previous of 1888 are filled with cases in which the validity of these withdrawals was sustained. In the case of *Prest v. Northern Pacific Railroad Company*, 2 Land Decisions, 506 and in the letter of instructions of Secretary Teller, dated May 17, 1883, 2 Land Decisions 511, the question is considered at length and the power of withdrawal sustained. This construction prevailed during the terms of Secretaries Usher, Browne, Cox, Delano, Kirkwood and Teller.

In *United States v. Pugh*, 99 U. S. 269, this court said:

> "It is a familiar principle of interpretation that in a case of doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."

In *United States v. Moore*, 95 U. S. 763, this court gave one of the reasons for this rule:

> "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

The construction of the executive officers, to which the courts give weight, is the *contemporaneous* and continued construction. Every intendment is in favor of the correctness of the practical construction with which Secretary Vilas was confronted when he announced the doctrine of the Guilford Miller case, but his own decision in that case overruling the long settled construction must rest solely upon his argument, which we have un-

dertaken to show ignores important and indeed controlling considerations and leads to a conclusion which is incorrect.

The conclusion of the supreme court of North Dakota sustaining the power of withdrawal is supported by *Thompson v. St. P. & M. & M. Ry. Co.*, 83 Fed. Rep .546, and *Southern Pacific Railroad Co. v. Groeck*, 87 Fed. Rep. 970.

In the latter case, decided by the circuit court of appeals for the Ninth circuit, the court construed section 6 of the grant by act of congress of July 27, 1866 (14 Stat. 292). Section 6 of this act is identical with section 6 of the Northern Pacific act. The court held, not only that section 6 did not forbid a withdrawal of indemnity lands, but constituted a statutory withdrawal after definite location.

C. W. BUNN and
JAMES B. KERR,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 34.

FRED HEWITT,

Plaintiff in Error,

v.

EMIL SCHULTZ, ET AL.

No. 47.

WILLIAM L. POWERS, ET AL.,

Plaintiffs in Error,

v.

JACOB SLAGHT.

No. 48.

J. M. MOORE,

Plaintiff in Error,

v.

D. B. STONE, ET AL.

No. 49.

J. M. MOORE,

Plaintiff in Error,

v.

JOHN CARMODE.

Reply Brief for Defendants in Error in No. 34 and Plaintiffs in Error in Nos. 47, 48, and 49.

I.

It is argued in the brief for defendant in error in No. 47, and urged upon the oral argument in the other cases, that the relief sought against the patents, issued under the ruling of the Secretary of the Interior, is barred by the statute of limitations. This argument is based upon a misapprehension of the ground upon which the relief is claimed. The law was settled by the decision of this Court in *Wisconsin Central R. Co.* v. *Price County* (133 U. S. 496), that the title to indemnity lands does not pass until the approval of the selection by the Secretary of the Interior. But it does not follow that a prior right cannot be initiated by selection which will be protected and enforced against one who receives a patent upon an entry subsequently initiated. This Court enforced such a right in *St. Paul and Sioux City R. Co.* v. *Winona and St. Peter R. Co.* (112 U. S. 720), and *St. Paul and Pacific R. Co.* v. *Northern Pacific R. Co.* (139 U. S. 1). The relief awarded in those cases was under the rule declared by this Court in *Johnson* v. *Towsley*, (13 Wall. 72), and *Moore* v. *Robbins* (96 U. S. 530, 535), as follows:

> "But that in this class of cases, as in all others,
> "there exists in the Courts of equity the jurisdiction
> "to correct mistakes, to relieve against frauds and
> "impositions, and in cases where it is clear that
> "those officers have, by a mistake of law, given to
> "one man the land which on the undisputed facts
> "belonged to another, to give appropriate relief."

But it is equally clear, under the decisions of this Court, that until a contest pending in the Land Department has been finally determined and the title to the land involved has passed out of the United States, the Courts will not assume jurisdiction to correct such errors of law. This Court said, in Marquez *v.* Frisbie (101 U. S. 473, 475):

> "We have repeatedly held that the Courts will not "interfere with the officers of the Government while "in the discharge of their duties in disposing of "public lands, either by injunction or mandamus. "* * * And we think it would be quite as ob- "jectionable to permit a State Court, while such a "question was under the consideration and within the "control of the executive departments, to take juris- "diction of the case by reason of their control of the "parties concerned, and render decree in advance of "the action of the Government, which would render "its patents a nullity."

It follows, therefore, that the suits before the Court could not have been commenced while the matters involved were still *in fieri* before the Land Department, and that, therefore, the statute of limitations could not begin to run until title passed out of the United States.

II.

It was suggested upon the argument, as a reason for sustaining the construction of the Northern Pacific grant adopted by the Interior Department, that under this construction many entries have been allowed and a reversal of the rule would work a hardship. In this connection the attention of the Court is requested to the provisions of the Act of Congress, approved July 1, 1898 (30 Stat.

620). By this act it is provided that wherever anyqualified settler has settled upon or purchased from the United States any portion of an odd-numbered section within the limits of the Northern Pacific grant, to which the Railroad Company makes claim, he shall have the option of relinquishing such land and taking an equal quantity elsewhere, or of retaining the land, and thereupon the railroad company is required to relinquish but receives the privilege of selecting an equal quantity of public land in any State through which its line runs.

The Railroad Company is not required to relinquish land which it has sold, but in such cases the adverse claimant has the privilege of transferring his claim. It is manifest that the provisions of the act are such as to allow the vast majority of settlers to retain their land.

The suggestion of counsel that a decision by this Court, affirming the validity of the withdrawal orders, would have the effect of dispossessing a large number of settlers is without foundation. The act of July 1, 1898, is sufficiently broad to afford substantial relief. The plain object of the act is to provide a remedy where errors, such as those apparent in the records in these cases, are corrected by the courts.

C. W. BUNN, and
JAMES B. KERR,
Of Counsel.

Supreme Court of the United States.

No. 47.—October Term, 1900.

William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company, a corporation; Spokane & Palouse Land Company, a corporation; Palouse Mill Company, a corporation, and A. F. Pugh, Plaintiffs in Error,
vs.
Jacob Slaght.

In error to the Supreme Court of the State of Washington.

[January 7th 1901.]

This action was commenced in one of the courts of the State of Washington by the present plaintiffs in error. They alleged in their second amended complaint that on or about December 15th 1883 the Northern Pacific Railroad Company, under and by virtue of the act of Congress approved July 2d 1864, 13 *Stat.* 365, *c.* 217, granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof, applied at the United States district land office in the district in which the lands were situated to select and selected lots 10, 11, 14 and 15 in section 1, township 16 north of range 45 east, Willamette meridian, Washington, with other lands, as indemnity in lieu of lands within the place limits of the grant to the company and which had been reserved, sold, granted or otherwise appropriated, or to which pre-emption or other claims or rights had attached at the date when the line of the company coterminous therewith was definitely fixed by filing a plat thereof in the office of the Commissioner of the General Land Office—a list of the lands selected, prepared in the manner and form prescribed by the rules and regulations of the Interior Department, being filed by the company in the district land office, and tender and payment made to the receiver thereof of the fees required by law to be paid upon the selection of lands. The list was allowed and approved by the register and receiver on December 17th 1883, the fees accepted, and thereafter the list was transmitted to the Commissioner of the General Land Office for approval. These lands were selected as public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, except such reservation, appropriation, claim and rights as had attached thereto in favor of the railroad company.

On October 26th 1887 the railroad company, in compliance with other and additional instructions of the officers of the Interior Department issued and given after the above selection had, as stated, been accepted, allowed and approved, filed a list designating the losses in lieu of which the lands described in the selection list were selected; and thereafter, in the years 1892 and 1893, the company, in compliance with instructions issued by the officers of the Interior Department subsequently to the acceptance, allowance and approval of the selection, rearranged the list of losses and the selection list so that the losses for which each tract of land selected by the company had been taken should be specifically designated. It appeared from the rearranged list that the lands in question were selected in lieu of certain lands included in section 7, township 9 north of range 15 east, Williamette meridian, Washington, which last-described land was located coterminous with and within forty miles of the line of the company as definitely fixed, and was at the date of the grant to the company, and at the date when its line coterminous therewith was definitely fixed, included in a reservation of land set apart for the Yakima Indians.

On or about December 24th 1885, after the selection of the above-described land, the Northern Pacific Railroad Company entered into a contract in writing with the plaintiff William L. Powers to convey to him lots 3, 6, 11 and 14 in section 1, township 16 north of range 45 east, upon the payment by him to the company of the sum of $822; and on August 4th 1887, payment having been made, the company conveyed the lots to him.

On July 30th 1887 the company conveyed to Powers lots 2, 7, 10 and 15 in that section.

In the year 1877 A. M. Duffield settled upon lots 2, 3, 6, 7, 10, 11, 14 and 15 in the section in question. Shortly thereafter he sold and assigned his possessory rights and improvements to L. M. Rhodes, and thereafter, Rhodes having failed to make payment therefor, the property was assigned to the plaintiff Powers, who settled thereon in 1881 with the expectation and intention of purchasing the lands or a portion thereof from the railroad company. Soon after such settlement Powers offered to purchase lots 2, 7, 10 and 15 from the company, and at the same time John G. Powers, a brother of the plaintiff, offered to purchase lots 3, 6, 11 and 14 from the company. Thereafter, as above stated, the plaintiff William L. Powers purchased the lands from the railroad company, having prior thereto taken a relinquishment from his brother of all interest in and to lots 2, 7, 10 and 15.

On or about March 1st 1883 the defendant Slaght rented and leased lot 10 of the plaintiff Powers, and received and took possession of the same. He paid rental therefor, as agreed, from the date upon which he took possession of the premises until the 31st day of October 1887.

On the last-named day Slaght presented an application at the United States district land office for the district in which the land was situated, to enter lots 10, 11, 14 and 15 as public lands of the United States, under the act of Congress approved May 20th 1862, 12 *Stat.* 392, *c.* 75, entitled "An act to secure homesteads to actual settlers on the public domain," alleging in his application that he had settled and established his actual residence upon those lands March 4th 1883, that such residence had been thereafter continuous, and that he had built a house on the land and improved the same. In the complaint in this case the plaintiffs averred that the settlement, occupation and improvement by Slaght were under and in pursuance of the renting and leasing of and from Powers, as above set forth, and not otherwise.

The Northern Pacific Railroad Company having been notified of the application of Slaght to enter the land, filed its objections against the allowance thereof on or about December 2d 1887. A hearing was ordered by the United States district land officers for the district in which the land was situate to determine the rights thereto of the railroad company and Slaght, and such proceedings were had in the contest that the district land officers, in July 1889, held the land to be excepted from the operation of the selection of the railroad company by reason of the settlement of the plaintiff Powers, and that the defendant Slaght had settled upon the land as the tenant of Powers.

The railroad company appealed from the decision of the district land officers to the Commissioner of the General Land Office. On April 13th 1895 the Commissioner rendered the following decision, directed to the register and receiver of the district land office at Walla Walla: "I have considered the contest of *Jacob Slaght* v. *Northern Pacific Railroad Company and William L. Powers, Intervenor,* involving lots 10, 11, 14, 15, sec. 1, T. 16 N., R. 45 east, the record in which was transmitted with your letter of July 10th 1889, on appeal by Jacob Slaght and said railroad company from your decision in favor of William L. Powers, intervenor. The land is within the limits of the withdrawal upon the line of the amended general route of said road, the map showing which was filed February 21st 1872, and upon the definite location of the road it fell within the indemnity limits, the order for the withdrawal of which was received at the local office November 30th 1880. These withdrawals have been held by the Department to be without authority of law and of no effect. 17 *L. D.* 8, *and* 18 *L. D.* 87. On December 17th 1883 the company selected the land in question under act of July 2d 1864 (13 *Stat.* 365), per list No. 1, and on the same day said company selected the land under acts of July 2d 1864 (13 *Stat.* 365) and May 31st 1870 (16 *Stat.* 376) for indemnity purposes per amendatory list No. 2. On October 31st 1887 Jacob Slaght presented an application to make homestead entry for this land and alleged that he

settled and established his actual residence thereon March 4th 1883 and the same has been continuous; that he built a house 12 x 14 feet, a kitchen 10 x 12 feet, a stable, dug a cellar and broke a garden spot, and built a half mile of fence, and that his improvements are worth about $275. The company was duly notified of said application and filed its objections against the acceptance of the same December 2d 1887. Upon the issuance of notice to the parties in interest a hearing in the case was had and concluded April 4th 1889, at which all parties were represented. The testimony adduced at the hearing on behalf of Slaght shows that he established his actual residence on the land in March 1883; that he broke and planted a garden; that within a few days after moving in the log house on the land he built an addition thereto; that in September 1883 he built a house 12 x 14 feet, a kitchen, a stable, a chicken house, dug a cellar, and fenced about eighty acres; that his residence on the above-described tracts of land has been continuous since March 1st 1883, and that his improvements are worth $400, and that he is a qualified settler."

After stating the substance of the evidence adduced, the Commissioner proceeded: "Therefore, in view of this showing, your decision in favor of William L. Powers is hereby reversed, likewise your decision adverse to Jacob Slaght. Your opinion that said company's selection as to this land was improperly allowed, and that the company had no right to the land prior to its selection, and as the same was occupied and improved as the home of a settler, Slaght's, at the date of selection, that such selection as to the land in question should be cancelled, was in accordance with the uniform practice of the Department, and I concur therein. Accordingly, said amendatory list No. 2 of selections of Dec. 17th 1883 by said company is hereby held for cancellation as to said lots 10, 11, 14, and 15, sec. 1, twp. 16 N., R. 45 E. The usual time, sixty days after notice, will be allowed the railroad company and William L. Powers within which to appeal to the honorable Secretary of the Interior. Should this decision become final, Slaght will be permitted to make homestead entry for this land. You will advise him of this action."

From the decision of the Commissioner the Northern Pacific Railroad Company appealed to the Secretary of the Interior, who, in 1896, affirmed the action of the Commissioner.

In 1897 Slaght received from the Interior Department letters patent of the United States conveying to him lots 10, 11, 14 and 15.

The plaintiffs averred that the letters patent were issued to Slaght under a misconstruction and misinterpretation of the law; that long prior to the settlement upon the land by Slaght the lands and each and all of them had been reserved for the use and benefit of the railroad company; that the plaintiff Powers had settled upon the lands with the intention of purchasing them from the company; that the lands were subject to selection

by the company, and by its selection thereof it acquired the title in and to the same; that at the time Slaght applied to enter the land, and at the date of the hearings in the contest above referred to, and at the date of the issuing of the letters patent to him, the land was not, nor was it at any of those times, public land subject to settlement or entry under the land laws of the United States other than the act of Congress approved July 2d 1864, above referred to, granting lands to the railroad company; and that the officers of the Interior Department were without authority to issue letters patent purporting to convey the land to Slaght, because the United States had long prior to the issuing of those letters parted with the title to the railroad company.

The complaint stated that the other of the above named plaintiffs in this cause asserted and claimed title to certain portions of the lands in dispute under and by virtue of conveyances from Powers and his grantees.

It was also averred that the plaintiff Powers had conveyed to various parties, with warranty to defend the title thereof, certain other portions of the land; that the questions involved and to be determined in this action were of common and general interest to many persons, who were so numerous that it was impracticable to bring them into court; that the plaintiffs and such other persons were the owners in fee-simple and had an indefeasible title and were in possession of the lots named, and the defendant claimed an interest or estate therein adverse to the plaintiffs, but that defendant had no estate, right, title or interest whatever in the same or to any part thereof; that the defendant was threatening to commence divers suits in ejectment, and without suit forcibly to dispossess and eject plaintiffs and the other numerous parties of and from the premises or a portion thereof, and unless restrained by an order of court would bring such suits, and would also without suit forcibly enter the premises and without any right whatever eject and dispossess them; and that thereby a multiplicity of suits would be caused and great costs and injuries inflicted upon them, the courts of the State greatly and unnecessarily burdened, and great and irreparable injury wrought to the other parties having common and general interest in the question involved in the cause.

The plaintiff therefore prayed (among other things) that the letters patent issued to Slaght be declared to have been issued under a misconstruction of the law and to be void and to constitute clouds upon the titles of the plaintiffs and of the various persons to whom the plaintiff Powers had conveyed any portion of the land in dispute; that Slaght be decreed to be a trustee holding such right, title and interest in and to those lands as he acquired under and by virtue of such letters patent, if any, for the benefit of the plaintiff Powers and his grantees, both direct and through mesne conveyances, and that Slaght be required to convey such right, title and interest, if any, to the plaintiff Powers and his grantees.

The plaintiffs also prayed for such other and further relief as was equitable and just.

A demurrer to the amended complaint was sustained and the plaintiffs electing not to plead further, the action was dismissed.

The judgment of dismissal was affirmed by the Supreme Court of the State of Washington upon the authority of the decision of that court in *Moore* v. *Carmode*, 20 *Wash.* 305, 712, just decided upon appeal to this court.

Mr. Justice HARLAN, after stating the facts as above reported, delivered the opinion of the Court.

The issue as to the validity of the order of withdrawal made by direction of the Secretary of the Interior of lands within the indemnity limits of the Northern Pacific Railroad Company, as indicated by the company's accepted map of definite location, presents the controlling question in this case. Unless such order be sustained as a valid exercise of power by that officer, there is no ground upon which a decree could be rendered against Slaght.

For the reasons stated in *Hewitt* v. *Schultz*, just decided, we hold, in conformity with the long-established practice in the Land Department, that that order of withdrawal must be regarded as inconsistent with the true construction of the act of Congress of July 2d 1864. The judgment of the Supreme Court of Washington is, accordingly,

Affirmed.

Mr. Justice BREWER and Mr. Justice SHIRAS dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 48.—October Term, 1900.

J. M. Moore, Plaintiff in Error,
vs.
D. B. Stone, Ammvillis Allen, Alma May Stone et al.

In error to the Supreme Court of the State of Washington.

[January 7th 1901.]

On the 12th day of December 1883 the Northern Pacific Railroad Company selected the northeast quarter of section 3, in township 13 north of range 42 east, Willamette meridian, in Garfield County, Washington, under the direction of the Secretary of the Interior, as indemnity in lieu of other lands. In making the selection it filed in the district land office at Walla Walla a list showing the tract selected, at the same time tendering to the officers of the district land office the fees required by law. The tract was selected as public land, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claim or rights. The list was accepted, allowed and approved by the officers named on January 5th 1884, and transmitted to the Commissioner of the General Land Office. On October 26th 1887, in compliance with and in pursuance of certain orders and directions subsequently made by the Secretary of the Interior, the railroad company designated the losses for which the above-described lands were selected as indemnity.

On the 30th day of June 1884 the defendant Dimon B. Stone presented an application to make a pre-emption declaratory statement for the lands selected as above stated by the railroad company, to the district land office at Walla Walla, alleging settlement upon the land April 25th 1882. His application was rejected, and on appeal to the Commissioner of the General Land Office a hearing in the matter was ordered to determine the condition of the land at the date of its selection and the respective rights of the defendant and the railroad company. At the hearing the officers of the district land office, in January 1891, held that the settlement of the defendant and the application to file the pre-emption declaratory statement excepted the lands from the grant to the railroad company, and that therefore they were not subject to selection by it; and the selection made was recommended to be cancelled.

The railroad company appealed to the Commissioner of the General Land Office. In a decision rendered April 30th 1895, and directed to

the register and receiver at Walla Walla, that officer said: "The land is within the limits of withdrawal upon the line of amended general route of said road, the map showing which was filed Feb. 21st 1872, and upon the definite location of the road it fell within the indemnity limits, the order for withdrawal of which was received at the local office Nov. 30th 1880. These withdrawals have been held by the Department to be without authority of law and of no effect. 17 *L. D.* 8, *and* 19 *L. D.* 87. . . . The testimony adduced at the hearing shows that Stone is a qualified settler, and established his actual residence with his family on the land about the middle of April 1882, in a cabin he built upon the tract; that in the summer of 1882 he built a house 16 x 24 feet, one and a half stories high, dug a well, and cultivated a garden; that in 1883 he cropped 15 acres to grain, in 1884 and 1885 15 acres, and in 1886 and 1887 40 acres, in 1888 45 acres, in 1889 140 acres, and in 1890 155 acres; that he has fenced the whole place, and that his improvements are worth from $700 to $800. You are of the opinion that Co.'s selection as to this land was improperly allowed, and that the Co. had no right to the tract prior to its selection, and that as the land was occupied and improved as the home of a qualified settler at the date of such selection, that such selection as to the land in question should be cancelled and Stone's application to make pre-emption should be overruled; your ruling is in accordance with the uniform practice of the Department, and I concur in same. Therefore, your decision is sustained and the amendatory list No. 1 of selection of Jan. 5th 1884, by said Co. is hereby held for cancellation as to the above-described tract of land."

On July 2d 1895 the railroad company, by general warranty deed and for a valuable consideration, sold and conveyed the north half of section 3 in the above-named township to the plaintiff Moore.

On May 20th 1896 the Secretary of the Interior sustained the above decision of the Commissioner of the General Land Office.

The amended complaint of the plaintiff Moore, after setting out the foregoing facts, alleged that the above decisions by the officers of the Land Department and the Secretary of the Interior were made and rendered under a misapprehension and mistake of law and were contrary to law; that under the rules and practice of the Department of the Interior the decision of the Secretary finally closed and determined in that Department the controversy as to the tract of land, of which fact the parties received notice, the contest being closed July 10th 1896; that thereafter the defendant made final proof and received a final receipt for the land, in which it was recited that he was entitled to a patent for the land from the United States; and that in 1897 a patent was issued to him.

The plaintiff averred that the United States district land officers, the Commissioner of the General Land Office and the Secretary of the Inte-

rior were wholly without jurisdiction to consider the application of the defendant Stone to make pre-emption entry of the land, for the reason that it was not public land of the United States subject to homestead entry, but at the time of the defendant's application had been withdrawn by order of the Secretary of the Interior from entry or sale under the settlement laws of the United States; that the railroad company was the owner in fee-simple of the premises and entitled to the legal title thereto and to a patent from the United States; that the patent issued to the defendant, or which, if not issued, would be issued to him, constituted the defendant a trustee, holding the legal title for the benefit of the plaintiff, and cast a cloud upon his title.

It was set out in the complaint that in 1898 the wife of the defendant Stone died intestate, "leaving as her heirs the defendants herein, who, excepting defendant D. B. Stone, are her children and the only children surviving her and the only children which she has or ever had; that the premises and property herein described, if any right or interest was ever acquired by defendant D. B. Stone, was acquired after his marriage with the said deceased; that some of said children of said deceased are of age and some are minors; that the names of those who are minors are Sylvia S. Jenks, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone; that the said Ammvillis Allen and Sylvia S. Jenks are married; that said children and defendants other than D. B. Stone have no other rights except as heirs of the said deceased."

The plaintiff therefore prayed that the defendants be declared trustees for the use and benefit of plaintiff; that by decree it be adjudged that defendants or either of them have no right, title, interest or estate whatever in and to these lands and premises or any part thereof; that the title of plaintiff be decreed good, valid and a fee-simple title; and that defendants be required to execute and deliver to plaintiff deed or deeds so as to vest in plaintiff a complete record title in and to the premises; that any and all pretended claims of defendants or either of them be held for naught and cancelled; that the defendants and each of them be enjoined and debarred from asserting any claim whatever in or to the lands or any part thereof adverse to the plaintiff; that plaintiff have judgment quieting his title against defendants and each of them, and removing the cloud thereon created by the pretended claim or claims of defendants or either of them; that plaintiff be adjudged entitled to immediate and exclusive possession of the premises and the whole and every part thereof and be put into possession thereof by order of the court; and that plaintiff have such other or further relief as should seem meet, proper and agreeable to equity.

The amended complaint was demurred to, and the demurrer was sustained; and the plaintiff declining to plead further, the action was

dismissed. The judgment of dismissal was affirmed in the Supreme Court of the State, on the authority of *Moore* v. *Cormode*, 20 *Wash.* 305, 713.

Mr. Justice HARLAN, after stating the facts as above reported, delivered the opinion of the Court.

As in the other cases just decided, the plaintiff's right to recover depended upon the validity of the order made by the Secretary of the Interior directing the withdrawal from sale or entry under the pre-emption and homestead laws of the United States of the odd-numbered sections of land within the indemnity limits of the Northern Pacific Railroad Company as defined by its map of definite location. The order was based wholly upon the filing and acceptance of that map, and in advance of any selection based on ascertained losses of distinct tracts in the place limits.

For the reasons stated in *Hewitt* v. *Schultz*, such order must be regarded as not authorized by the act of July 2d 1864, under which the railroad company and its grantee claimed title; and upon that ground the judgment of the Supreme Court of the State of Washington must be and is

Affirmed.

Mr. Justice BREWER and Mr. Justice SHIRAS dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 49.—October Term, 1900.

J. M. Moore, Plaintiff in Error, vs. John Cormode. } In error to the Supreme Court of the State of Washington.

[January 7th 1901.]

This action was commenced in the Superior Court of the State of Washington for Garfield County. From an amended complaint filed by Moore, now plaintiff in error, it appears that on December 12th 1883 the Northern Pacific Railroad Company, under authority of the act of Congress of July 2d 1864, 13 *Stat.* 365, *c.* 217, granting lands to aid in the construction of its road, selected under the direction of the Secretary of the Interior, the northwest quarter of section 3, in township 13 north of range 42 east, Willamette meridian, in Garfield County in the then Territory of Washington, as indemnity and in lieu of other specified lands excepted from its grant.

On July 2d 1895 the railroad company for a valuable consideration sold and conveyed to Moore by general warranty deed the north half of the above-described quarter section.

Prior to that transfer, namely, on the 17th day of July 1890, the defendant Cormode presented for filing in the district land office at Walla Walla, Washington, a declaratory statement setting forth that the land in question had been settled on in March or April 1882 by Mrs. Ora Standiford, and that she and a subsequent purchaser of her improvements had resided continuously thereon until 1889, when the defendant purchased the improvements and moved upon the land.

Upon a hearing ordered before the land office at Walla Walla, to determine the right of the Northern Pacific Railroad Company to the land in dispute, the register and receiver of that office, in January 1891, held that the settlement upon the premises by Mrs. Standiford and the occupation of the same thereafter by her and the subsequent purchasers, including the defendant, excepted the lands from the grant to the railroad company, and that therefore they were not subject to selection by it. The selection made by the company was accordingly recommended to be cancelled.

An appeal was taken by the railroad company to the Commissioner of the General Land Office, and that officer rendered a decision on April 25th 1895, directed to the register and receiver at Walla Walla, in which he said: "I have considered the above entitled case, involving N.W. 3,

13 N., 42 E., appeal by the R'y Co. from your decision in favor of Cormode. The land is within the indemnity limits of the grant to the Northern Pac. R. R. Co., and was selected by the Co. Jan. 5th 1884, list No. 1. Both parties appearing at the hearing held Jan. 6th 1891, and from the testimony then taken it appears in substance as follows: The land was settled on March or April, 1882, by Mrs. Ora Standiford, who was qualified to enter under the homestead law. Her settlement consisted of the erection of a frame house 16x18 ft., 1 story and a half high, on the land, the plowing and cultivating of three or four acres, and the digging of a well. At that time she established her residence on the land and remained there continuously with her family until the fall of 1885, when she sold her improvements upon and interest in the land to John A. Long, who occupied the land for a short time and was succeeded by his brother, Henry W. Long, in 1888, who remained in possession until the fall of 1889, when the present applicant, Cormode, who applied for the same under pre-emption law in July, 1890, purchased the improvements and moved onto the land. Since then Cormode continuously resided upon and improved the land. It would thus appear that on Jan. 5th 1884, when the right of the R'y Co. attached, the land was embraced in the *bona fide* settlement of a party, Mrs. Standiford, qualified to enter the same under the settlement laws. Your decision is therefore affirmed and the Co.'s selection of that date held for cancellation as invalid."

The decision of the Commissioner was sustained by the Secretary of the Interior on May 20th 1896.

Thereafter the defendant Cormode made final proof of his claim, and, a final receipt having been issued to him by the district land office, on the 2d of May 1898 he received a patent from the United States conveying to him the title to the land.

The plaintiff averred that the decisions of the register and receiver of the General Land Office and the Secretary of the Interior were made and rendered under misapprehension of law; that the officers of the Land Department and the Secretary of the Interior were wholly without jurisdiction to consider the application of the defendant to make pre-emption entry of the land, for the reason that the land was not at that time public land of the United States and was not then subject to homestead entry, but before the date of the defendant's application had been withdrawn from entry or sale, and that the decisions allowing the defendant to enter the land were void, and the entry made also void and of no effect; that the Northern Pacific Railroad Company under the grant by the act of July 2d 1864 became and was the owner in fee simple of the land and entitled to a patent therefor from the United States; that the defendant's patent constituted him a trustee, holding the legal title for the benefit of the plaintiff, and was a cloud upon the latter's title; and that the defendant wrongfully and unlawfully

withheld the possession of the premises, although the plaintiff had at various times demanded the same.

A demurrer to the complaint was sustained; and the plaintiff declined to plead further. Whereupon the court, on motion of the defendant, dismissed the action. That judgment was affirmed in the Supreme Court of the State, all the members of the court concurring in such affirmance. In its opinion in the case that court said: "But, taking a broad view of the question in considering the primary effect of the act [of Congress of July 2d 1864] as a matter of public policy, which is always permissible where there is room for construction and the true intent is a matter of doubt, we are of the opinion that there was no intention to withdraw from actual settlement the immense quantity of lands embraced within the indemnity limits. This phase of the matter has received consideration in a number of cases. Attention is called to the fact that it was expected when the law was enacted that the road would be speedily constructed, and that it would traverse, in the main, practically unoccupied territory, and that there would be consequently no great loss of lands within the place limits. It might well have been considered that there would be ample lands within the indemnity limits to make good such losses, although these lands were open to settlement at all time prior to their actual selection. See *N. P. R. R. Co.* v. *Musser, Sauntry, &c.*, 168 *U. S.* 604. And after a consideration of the numerous cases cited in the briefs we are of the opinion that the grant did not take effect as to any lands within the indemnity limits until actually selected by the company, and that prior thereto they were open to settlement. It has been the long-continued policy of the Government to facilitate the settlement of its unoccupied lands, and so great a restriction as this would have been under the company's contention could hardly have been contemplated. The departmental withdrawal was subsequently set aside and cannot operate to extend the provisions of the act. Those parts of the discussion or statements in some of the cases most relied upon by the appellant are not in harmony with the later expressions of the court, especially in *N. P. R. R. Co.* v. *Colburn*, 164 *U. S.* 383, and *N. P. R. R. Co.* v. *Sanders*, 166 *U. S.* 620. Also the prevailing and long-continued construction of the act by the Land Department is entitled to great weight in determining the questions raised. Many patents have been issued thereunder to settlers who are now occupying the lands, as in this case, and doubtless frequent transfers have been made to others who have regarded the title as perfect, for the issuance of a patent is regarded by the common mind as conclusive, and if it is a matter of doubt the overturning of these rights and the construction of the Land Department should be reserved for the highest court in the land. Furthermore it is most strenuously insisted by the respondent that the case must be decided in his favor on the ground that it does not appear that there was any finding by the Land Department that there was any defi-

ciency in place lands, and that under the familiar rule applied to judgments, if an affirmative finding that there was no loss of place limits was necessary, then that such finding would be presumed; that all presumptions are in favor of the regularity of the proceedings in the Land Department to sustain a patent. The appellant has undertaken to conclude this matter by averment in his complaint, and contends that the indemnity lands were appropriated without selection by reason of the deficiency in place limits, and that the court is bound by the allegations of the complaint in this particular. There is no allegation, however, that there was a finding by the Secretary of the Interior or in the proceedings before the Land Department that there was a deficiency in place limits, and it seems to us that to enable the company to claim this land there must have been a finding that there was a deficiency within the place limits for which the lands claimed were taken, or that it was conclusively established in the proceedings before the Department. This matter was a question of fact essentially within the jurisdiction of the Land Department, and its judgment should be sustained unless it appears that it is in conflict with the facts therein found or established. It may have been found that there was no deficiency entitling the company to select these lands. It was found that when the selection was made the land was occupied by a qualified settler, and the company therefore not entitled to take it. The contention of the appellant with reference to the allegations of the complaint in this respect are in our opinion overborne by the authorities. *Johnson* v. *Drew*, 171 *U. S.* 93; *Durango Land and Coal Co.* v. *Evans*, 80 *Fed. Rep.* 425; *Gale* v. *Best*, 78 *Cal.* 235; *New Dunderberg Min. Co.* v. *Old et al.*, 79 *Fed. Rep.* 598." 20 *Wash.* 305.

Mr. Justice HARLAN, after stating the facts as above reported, delivered the opinion of the Court.

The land in controversy is within the indemnity limits of the Northern Pacific Railroad Company as shown by its map of definite location. It was embraced by the order made by the Secretary in November 1880, whereby the local land office was directed to withdraw and hold reserved "from sale or homestead or other entry" all of the odd-numbered sections "within the place and first indemnity limits" of the Northern Pacific Railroad, as indicated on its map of definite location filed in October 1880. That order of course proceeded on the ground that under the act of July 2d 1864, 13 *Stat.* 365, *c.* 217, it was competent for the Secretary of the Interior immediately upon the filing and acceptance of the company's map of definite location to withdraw from the operation of the pre-emption and homestead laws all the odd-numbered sections within the indemnity limits of the road and coterminous with the line of such definite location. The act of 1864 has been differently interpreted in the Land Department

since the decision in 1888 of Secretary Vilas in *Northern Pacific Railroad* v. *Miller*, 7 *L. D.* 100. For the reasons stated in the opinion just delivered in *Hewitt* v. *Schultz*, we accept that decision as indicating the construction of the act of 1864 to be observed in the administration of the grant of public lands to the Northern Pacific Railroad Company. This leads to an affirmance of the judgment without reference to other questions discussed at the bar.

The judgment of the Supreme Court of the State of Washington must be and is hereby

Affirmed.

Mr. Justice BREWER and Mr. Justice SHIRAS dissented.

True copy.

Test:

Clerk Supreme Court, U. S.